264 N.C. App.—No. 2 Pages 137-250

ADVANCE SHEETS

OF

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

JULY 16, 2020

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COURT OF APPEALS

CASES REPORTED

FILED 5 MARCH 2019

CASES REPORTED WITHOUT PUBLISHED OPINIONS

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APPEAL AND ERROR

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SCHEDULE FOR HEARING APPEALS DURING 2020

NORTH CAROLINA COURT OF APPEALS

Cases for argument will be calendared during the following weeks:

January 6 and 20 (20th Holiday)

February 3 and 17

March 2, 16 and 30

April 13 and 27

May 11 and 25 (25th Holiday)

June 8

July None Scheduled

August 10 and 24

September 7 (7th Holiday) and 21

October 5 and 19

November 2, 16 and 30

BROWN v. THOMPSON

[264 N.C. App. 137 (2019)]

SHAKEEVIA BROWN, Plaintiff-Appellee
v.
STEPHEN SHAW THOMPSON, Defendant-Appellant

No. COA18-919

Filed 5 March 2019

Appeal and Error—interlocutory orders—summary judgment motion—based on res judicata—possibility of inconsistent verdicts

An interlocutory appeal from an order denying defendant's motion for summary judgment (MSJ) was dismissed. Defendant's argument—that the order affected a substantial right because his MSJ was based on the defense of res judicata—was misplaced because there was no possibility of inconsistent verdicts if the case proceeded to trial.

Appeal by defendant from order entered 6 June 2018 by Judge Vince M. Rozier, Jr., in Wake County Superior Court. Heard in the Court of Appeals 13 February 2019.

No brief filed for plaintiff-appellee.

Blue LLP, by Dhamian A. Blue, for defendant-appellant.

ARROWOOD, Judge.

Stephen Shaw Thompson ("defendant") appeals from the trial court's order denying his motion for summary judgment. For the following reasons, we dismiss the appeal.

I. Background

Shakeevia Brown ("plaintiff") commenced this action against defendant on 27 July 2017. Plaintiff asserted allegations including defamation, intentional infliction of emotional distress, negligent infliction of emotional distress, and sexual harassment. Defendant filed a motion to dismiss and an answer on 11 October 2017.

On 25 April 2018, defendant filed a motion for summary judgment, or in the alternative, a motion to dismiss for failure to prosecute. Defendant sought summary judgment on the basis that principles of *res judicata* precluded plaintiff from any recovery. Defendant attached to the motion a copy of a "Complaint for No-contact Order for Stalking or Nonconsensual Sexual Conduct" filed by plaintiff in Wake County

District Court on 5 October 2017. Defendant also attached to the motion a copy of the district court's 2 November 2017 "No Contact Order for Stalking or Nonconsensual Sexual Conduct" denying plaintiff's complaint and dismissing the matter upon finding a failure to prosecute.

Defendant's motion for summary judgment was heard at the 31 May 2018 session of Wake County Superior Court. On 6 June 2018, the trial court entered an order denying defendant's motion for summary judgment. Defendant filed notice of appeal on 27 June 2018.

II. Discussion

At the outset, we must address the interlocutory nature of defendant's appeal.

An order denying of a motion for summary judgment is an interlocutory order because it leaves the matter for further action by the trial court. *See Veazey v. City of Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381 (1950) ("An interlocutory order is one made during the pendency of an action, which does not dispose of the case, but leaves it for further action by the trial court in order to settle and determine the entire controversy."). "Generally, there is no right of immediate appeal from interlocutory orders and judgments." *Goldston v. Am. Motors Corp.*, 326 N.C. 723, 725, 392 S.E.2d 735, 736 (1990). However, "immediate appeal is available from an interlocutory order or judgment which affects a substantial right." *Sharpe v. Worland*, 351 N.C. 159, 162, 522 S.E.2d 577, 579 (1999) (quotation marks omitted).[1]

"[W]hen an appeal is interlocutory, the appellant must include in its statement of grounds for appellate review 'sufficient facts and argument to support appellate review on the ground that the challenged order affects a substantial right.' " *Johnson v. Lucas*, 168 N.C. App. 515, 518, 608 S.E.2d 336, 338 (quoting N.C.R. App. P. 28(b)(4)), *aff'd per curiam*, 360 N.C. 53, 619 S.E.2d 502 (2005). "The appellants must present more than a bare assertion that the order affects a substantial right; they must demonstrate *why* the order affects a substantial right." *Hoke Cnty. Bd. of Educ. v. State*, 198 N.C. App. 274, 277-78, 679 S.E.2d 512, 516 (2009) (emphasis in original).

Defendant concedes this appeal is interlocutory, but contends it affects a substantial right because the basis of his motion for summary

1. Immediate appeal is also available if the trial court certifies the matter for immediate appeal. *See* N.C. Gen. Stat. § 1A-1, Rule 54 (b) (2017); *Sharpe*, 351 N.C. at 161-62, 522 S.E.2d at 579. However, the trial court did not certify its order in this case as immediately appealable under Rule 54(b).

judgment was that recovery in this action is barred by principles of *res judicata*.

As defendant points out, this Court has acknowledged that "our Supreme Court has ruled that the denial of a motion for summary judgment based on the defense of *res judicata* . . . is immediately appealable." *McCallum v. N.C. Co-op. Ext. Serv. of N.C. State Univ.*, 142 N.C. App. 48, 51, 542 S.E.2d 227, 231 (citing *Bockweg v. Anderson*, 333 N.C. 486, 491, 428 S.E.2d 157, 161 (1993)), *appeal dismissed and disc. review denied*, 353 N.C. 452, 548 S.E.2d 527 (2001). When considered in isolation, the above quote seems to be an absolute statement of the law; however, in context, it is clear that this Court was simply noting that, in *Bockweg*, the denial of the defendant's motion for summary judgment based on the defense of *res judicata* was held to affect a substantial right. In *McCallum*, this Court further stated, "the denial of summary judgment based on the defense of *res judicata* can affect a substantial right and may be immediately appealed." *Id.* (citing *Bockweg*, 333 N.C. at 491, 428 S.E.2d at 161).

In *Bockweg*, the Supreme Court explained why the denial of a motion for summary judgment based on the defense of *res judicata* can affect a substantial right and may be immediately appealable:

> As a general rule, a moving party may not appeal the denial of a motion for summary judgment because ordinarily such an order does not affect a substantial right. However, we have noted that while [t]he right to avoid one trial on the disputed issues is not normally a substantial right that would allow an interlocutory appeal, . . . the right to avoid the possibility of two trials on the same issues can be such a substantial right.

333 N.C. at 490-91, 428 S.E.2d at 160 (quotation marks and citations omitted).

> Under the doctrine of *res judicata*, a final judgment on the merits in a prior action in a court of competent jurisdiction precludes a second suit involving the same claim between the same parties or those in privity with them. Thus, a motion for summary judgment based on *res judicata* is directed at preventing the possibility that a successful defendant, or one in privity with that defendant, will twice have to defend against the same claim by the same plaintiff, or one in privity with that plaintiff. Denial of the motion could lead to a second trial

> in frustration of the underlying principles of the doctrine of *res judicata*. Therefore, we hold that the denial of a motion for summary judgment based on the defense of *res judicata* may affect a substantial right, making the order immediately appealable.

Id. at 491, 428 S.E.2d at 161 (internal citations omitted).

Subsequent to the Court's decision in *Bockweg*, this Court has noted the permissive language in *Bockweg*, emphasizing that *Bockweg* holds the denial of summary judgment based on a defense of *res judicata* "may" affect a substantial right. *See Country Club of Johnston Cnty., Inc. v. U.S. Fidelity and Gaur. Co.*, 135 N.C. App. 159, 166, 519 S.E.2d 540, 545 (1999) ("[W]e do not read *Bockweg* as mandating in every instance immediate appeal of the denial of a summary judgment motion based upon the defense of *res judicata*. The opinion pointedly states reliance upon *res judicata* 'may affect a substantial right.' ") (quoting *Bockweg*, 333 N.C. at 491, 428 S.E.2d at 161 (emphasis added)), *disc. review denied*, 351 N.C. 352, 542 S.E.2d 207 (2000). In *Country Club of Johnston Cnty.*, this Court explained that,

> in an opinion issued shortly after *Bockweg*, *Community Bank v. Whitley*, 116 N.C. App. 731, 449 S.E.2d 226, *disc. review denied*, 338 N.C. 667, 453 S.E.2d 175 (1994), [it] interpreted the permissive language of *Bockweg* as allowing, under the substantial right exception, immediate appeal of the denial of a motion for summary judgment based, *inter alia*, upon defense of *res judicata* "*where a possibility of inconsistent verdicts exists if the case proceeds to trial*." *Id.* at 733, 449 S.E.2d at 227 (emphasis added); *see also Little v. Hamel*, 134 N.C. App. 485, 517 S.E.2d 901 (1999) (appeal of denial of summary judgment motion based upon *res judicata* considered to affect substantial right where, although not directly noted by the Court, defendants had been absolved of liability in previous suit between the parties and faced possibility of inconsistent verdicts).
>
> In short, denial of a motion for summary judgment based upon the defense of *res judicata* may involve a substantial right so as to permit immediate appeal only "where a possibility of inconsistent verdicts exists if the case proceeds to trial." *Community Bank*, 116 N.C. App. at 733, 449 S.E.2d at 227.

135 N.C. App. at 166-67, 519 S.E.2d at 545-46. There was no possibility of inconsistent verdicts in *Country Club of Johnston Cnty.*, *id.* at 167, 519 S.E.2d at 546, and this Court dismissed the appeal, *id.* at 168, 519 S.E.2d at 546; *see also Northwestern Fin. Group, Inc. v. Cnty. Of Gaston*, 110 N.C. App. 531, 536, 430 S.E.2d 689, 692 (holding there was no possibility for inconsistent verdicts because there had yet to be a trial in the matter because the initial action sought only equitable relief), *disc. review denied*, 334 N.C. 621, 435 S.E.2d 337 (1993). Citing *Country Club of Johnston Cnty.* and *Northwestern Fin. Group, Inc.*, this Court has more recently stated that it "has previously limited interlocutory appeals to the situation when the rejection of [a *res judicata* defense] gave rise to a risk of two actual trials resulting in two different verdicts." *Foster v. Crandell*, 181 N.C. App. 152, 162, 638 S.E.2d 526, 534, *disc. review denied*, 361 N.C. 567, 650 S.E.2d 602 (2007).

The present case is easily distinguishable from cases holding the denial of a motion for summary judgment on the basis of *res judicata* raises a substantial right to permit immediate appellate review. First, the posture of this case is unique in that the complaint in the present action was filed prior to the complaint in the district court case that defendant now claims precludes recovery. Second, the district court case, which sought only a no contact order under Chapter 50C of the General Statutes based on factual allegations similar to those made in the present case, was dismissed for plaintiff's failure to prosecute. Although a dismissal that does not indicate otherwise operates as an adjudication on the merits, *see* N.C. Gen. Stat. § 1A-1, Rule 41(b) (2017), there was no determination of the underlying issues that would raise the potential for an inconsistent verdict in the present case. Additionally, the issues to be decided in a Chapter 50C action for a no contact order are substantially more narrow than those to be determined in the present action seeking additional relief including money damages, relief not afforded in a Chapter 50C action. As a result, we hold the doctrine of *res judicata* does not raise a substantial right in this case to permit an immediate appeal of the trial court's denial of defendant's motion for summary judgment.

III. Conclusion

The denial of defendant's motion for summary judgment on the basis of *res judicata* does not affect a substantial right in this instance. Therefore, immediate appeal is not proper and defendant's appeal is dismissed.

DISMISSED.

Judges STROUD and TYSON concur.

JOHN P. CONKLIN, PLAINTIFF
v.
TOMMIE JEAN CONKLIN, DEFENDANT

No. COA18-509

Filed 5 March 2019

1. Attorney Fees—child custody—good faith requirement—genuine dispute

In awarding $45,000 in attorney fees to a mother in a child custody action, the trial court's conclusion that the mother acted in good faith was supported by abundant evidence that the parties had a genuine dispute over custody of the children, including numerous motions filed by both parties.

2. Attorney Fees—child custody—sufficiency of means to defray expense of the case—evidentiary support

In awarding $45,000 in attorney fees to a mother in a child custody action, the trial court's conclusion that the mother had insufficient means to defray the cost of the litigation was supported by unchallenged findings regarding the disparity in income between the parties, the mother's minimal savings, the complexity of the litigation, and other factors.

3. Attorney Fees—child custody—amount—abuse of discretion argument

In awarding $45,000 in attorney fees to a mother in a child custody action, the trial court did not abuse its discretion regarding the amount of the award where the court considered the reasonableness of the attorney's rate and considered and rejected the father's argument that the mother's attorney did not expect to be paid.

Appeal by plaintiff from order entered 29 November 2017 by Judge Jena P. Culler in District Court, Mecklenburg County. Heard in the Court of Appeals 31 October 2018.

Church Watson Law, PLLC, by Seth A. Glazer, for plaintiff-appellant.

Myers Law Firm, PLLC, by R. Lee Myers, for defendant-appellee.

STROUD, Judge.

Father appeals from an order awarding attorney's fees. Although the parties ultimately settled their custody dispute in a manner more favorable to Father than Mother initially sought, the trial court did not err in determining that Mother acted in good faith in defending against Father's claims regarding child custody and child support and pursuing her own counterclaims. Where Father's monthly income was approximately nine times more than Mother's income, and she had recently declared bankruptcy, the trial court did not err in finding that Mother had insufficient means to defray the expense of this suit and was entitled to an award of attorney's fees. We therefore affirm the trial court's order.

I. Background

The parties married in 1999, separated in 2008, and later divorced. In 2009, they entered into a Separation and Property Settlement agreement which addressed child custody and child support for their three children; the parties had joint legal custody of the children, and Mother had primary physical custody. Father had visitation every other weekend and on designated holidays. In 2013, Father filed a complaint for child custody, child support, and attorney's fees, requesting that he have "no less than joint physical and legal custody of the minor children," for the court to establish child support, for attorney's fees, and for a temporary parenting arrangement. Mother filed a response to the request for temporary parenting arrangement and an answer and counterclaims for custody, child support, specific performance, and attorney's fees.

Over the next three years, the parties engaged in discovery and filed many motions and counter-motions, and the trial court entered many orders. Finally, on 2 June 2016, the trial court entered a "Consent Order for Modification Permanent Child Custody and Dismissal of Motions for Contempt and Orders to Show Cause." The Consent order granted joint legal and physical custody of the children to the parties and includes extensive detailed provisions regarding decision-making, regular and holiday schedules, extracurricular activities, communications between the parties, use of drugs and alcohol by the parties, relocation, appointment of a parenting coordinator, and other matters. The Consent order provided that "[a]ny pending claims for attorney's fees and costs not resolved by this Order, shall remain open for determination by this Court." The trial court held a hearing on Mother's request for attorney's fees on 20 July 2017. The trial court entered an order awarding Mother $45,000.00 in attorney's fees on 29 November 2017, and Father timely appealed.

II. Standard of Review

The issues on appeal arise from the trial court's award of attorney's fees to Mother under N.C. Gen. Stat. § 50-13.6:

> In an action or proceeding for the custody or support, or both, of a minor child, including a motion in the cause for the modification or revocation of an existing order for custody or support, or both, the court may in its discretion order payment of reasonable attorney's fees to an interested party acting in good faith who has insufficient means to defray the expense of the suit.

N.C. Gen. Stat. § 50-13.6 (2017). Before awarding fees, the trial court must conclude that the party seeking an award of fees is "an interested party acting in good faith who has insufficient means to defray the expense of the suit." *Id.* "Whether these statutory requirements have been met is a question of law, reviewable on appeal. Only when these requirements have been met does the standard of review change to abuse of discretion for an examination of the amount of attorney's fees awarded." *Schneider v. Schneider*, ___ N.C. App. ___, ___, 807 S.E.2d 165, 166 (2017). In addition, the trial court's findings of fact must be supported by competent evidence. *See Simpson v. Simpson*, 209 N.C. App. 320, 324, 703 S.E.2d 890, 893 (2011).

III. Acting in Good Faith

[1] Father first argues that Mother has not acted or proceeded in good faith.[1] He argues that "[t]he reality of this case is that there was never a 'legitimate dispute' between the parties with respect to the custody of the minor children. The 'dispute' was at all times one-sided and manufactured by the [Mother's] bad faith resistance to allow [Father] to increase his parenting time of the minor children." He claims the trial court was "unjustly punishing" him with the award of attorney's fees. Father challenges the trial court's finding that "Mother has conducted herself as a reasonable party acting in good faith" and the trial court's related conclusion:

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1. We note that Father's arguments in his brief broadly cross-reference his 21 proposed issues on appeal. We have addressed only those issues for which he has set forth a specific argument, challenge to a specific finding or conclusion, and legal authority. The listing of issue numbers alone is not sufficient to make or preserve challenges that are not specifically made in his brief, and we have considered only the arguments actually made in the brief. *See* N.C. R. App. P. 28(b)(6).

> 5. Mother has proceeded and acted in this matter in "good faith" pursuant to N.C.G.S. §50-13.6.

While there is not a legal definition of good faith in this context, our Supreme Court has previously adopted the definition of good faith as "honesty of intention, and freedom from knowledge of circumstances which ought to put one upon inquiry" for Rule 11 sanctions. *Bryson v. Sullivan*, 330 N.C. 644, 662, 412 S.E.2d 327, 336 (1992) (brackets omitted). "Because the element of good faith is seldom in issue a party satisfies it by demonstrating that he or she seeks custody in a genuine dispute with the other party." *Setzler v. Setzler*, 244 N.C. App. 465, 467, 781 S.E.2d 64, 66 (2015) (citation, quotation marks, and ellipsis omitted).

Here, the record and transcript abundantly demonstrate that the parties had a genuine dispute over custody of the children. Father wanted joint legal and physical custody, with the children spending equal time with each parent, while Mother wanted to maintain their previous custody arrangement of weekend and holiday visitation to provide more stability for the children. Father argues that because the parties ultimately agreed to an equal custody arrangement in a consent order, that Mother did not act in good faith by defending against Father's custody claim and pursuing her own custody claim.

Father's argument overlooks the history of the litigation regarding custody in this case and the many issues beyond the precise custodial schedule of the children. We will not recite the entire history of the litigation, but both parties filed many motions, including motions for contempt and to compel discovery. The trial court entered orders on many of these motions. In 2014, the trial court entered a custody order including these findings of fact:

> 42. Father is asking the Court to allow the minor children to equally (50/50) spend time with each parent so that he has quality time to spend with the minor children on a regular basis. Father's life and current work schedule would permit him have joint (50/50) physical custody of the minor children.
>
> 43. Mother believes that the current parenting time schedule provides stability and that is what is important for the minor children. She does not want to see their routine changed. However, Mother is amenable to a week-on/week-off parenting time schedule during the summer, so long as Father is not drinking.

> 44. This Court finds that it is in the best interests of the minor children that they do have a routine which provides stability, but they also have the opportunity to spend quality time with both parents.
>
> 45. This Court finds that it is in the best interests of the minor children that Father's parenting time be expanded, but that the minor children are also not forced into a schedule that does not provide for stability and continuity. Particularly concerning to this court is [R.C.] with his struggle in school and how a huge change in his every day schedule and structure might affect him as the parties work towards helping him progress in school.
>
> 46. This Court finds that it is in the best interests of the minor children for their primary physical custody to remain with Mother and for Father to have secondary physical custody of the minor children. Father's parenting time with the minor children shall be expanded from what he currently has.

In the Consent Custody order, the trial court noted some of the history of the case and the disposition of the pending motions:

> 6. On September 14, 2014, this Court entered an Order for Permanent Child Custody (hereinafter the "First Custody Order").
>
> 7. On April 13, 2015, Father filed a Motion for Modification of Child Custody and Motion for Contempt and Order to Show Cause. An Order to Show Cause was entered on April 16, 2015.
>
> 8. On July 27, 2015, Father filed a Second Motion for Modification of Child Custody and Motion for Contempt and Order to Show Cause. No Order to Show Cause was entered with respect to this Motion for Contempt.
>
> 9. On October 30, 2015, Mother filed a Motion for Contempt. An Order to Show Cause was entered on November 6, 2015.
>
> 10. On December 15, 2015, Father filed a Motion for Emergency Child Custody; Motion for Temporary Parenting Arrangement; and Third Motion to Modify Child Custody.

> 11. On December 17, 2015, this Court entered an Order Denying Temporary Emergency Custody and Father's Motion for Temporary Parenting Arrangement.
>
> 12. On February 26, 2016, Mother filed a Motion for Contempt. No Order to show Cause was entered with respect to this Motion for Contempt.
>
> . . . .
>
> 5. DISMISSAL OF MOTIONS FOR CONTEMPT. Father's April 13, 2015 Motion for Contempt and Order to Show Cause is hereby dismissed. This Court's Order to Show Cause issued on April 16, 2015 is hereby dismissed. Father's July 27, 2015 Motion for Contempt and Order to Show Cause is hereby dismissed. Mother's October 30, 2015 Motion for Contempt is hereby dismissed. This Court's Order to Show Cause issued on November 6, 2016 is hereby dismissed. Mother's February 26, 2016 Motion for Contempt is here by [sic] dismissed. Any and all attorney's fees claims with respect to these Motion for Contempt are hereby dismissed.

In the attorney fee order on appeal, the trial court also carefully allocated the attorney fees attributable to the various claims and motions and specifically noted:

> 12. This Order deals only with attorney's fees in connection with the original permanent child custody and original child support Orders.
>
> 13. While there have been other issues that the Court has ruled on, those have been dealt with separately and no fees for those other issues are included in this Order.

Father also does not challenge the trial court's allocation of fees to the child custody and support issue; he challenges just the conclusion of good faith because the case was ultimately, after years of litigation, settled.[2]

Father's logic that the existence of a genuine disagreement is determined solely by the outcome is seriously flawed and not supported by

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2. Again, as noted above, Father's listing of issue numbers from the record on appeal is not sufficient to preserve his argument as to any particular finding of fact or conclusion of law, and we have addressed only those clearly identified in his brief.

the law. *See id.* at 468, 781 S.E.2d at 66 ("[I]t is undisputed that defendant was in a genuine dispute with plaintiff—plaintiff initiated a claim for custody and defendant brought a counterclaim for custody."). Were we to adopt Father's argument, parties would have a strong disincentive to settle a custody or child support case, since the party who ultimately agrees to a resolution more similar to the one sought by the other party would risk liability for attorney's fees for not acting in good faith. Instead, they would opt to pursue the litigation to its bitter end even if they may be otherwise willing to settle. This is exactly the opposite result encouraged by our statutes and case law. *Dixie Lines v. Grannick*, 238 N.C. 552, 555, 78 S.E.2d 410, 413 (1953) ("The law favors the settlement of controversies out of court. It encourages such action by securing to every man the opportunity to negotiate for the purchase of his peace without prejudice to his rights." (citations omitted)).

As Mother's brief notes, Father's statement of the facts in his brief is argumentative and blames the entire dispute on Mother's unreasonable refusal to agree with his wishes. Father's arguments on appeal bear some similarity to the arguments made in the hearing regarding attorney's fees. The trial court noted the obvious discord between counsel for the parties at the hearing:

> This case perplexes me so much, the way both of the attorneys have behaved in this case towards each other. I know all three of you, and I have never seen any of this behavior in other cases with y'all. And it's just perplexing to the Court how it can get this out of hand. I have asked both sides to seriously consider whether or not they want to go down that path[3] and proceed with the hearing. And I have asked to have an answer after lunch because it's the last thing scheduled. We've got three other matters or two other matters to finish up. . . . So I really want everybody to cool down. I want to hear your argument on the child support, on the -- on the attorney's fees, your argument on the attorney's fees, and then I'm going to recess for lunch and go to my [meeting]. . . . And then I want to know when we resume, probably 1:45, whether or not both sides are still insisting on pursuing whatever claims they may or may not have, and I'll be happy to hear arguments about whether

3. At this point in the hearing, counsel for both parties were requesting sanctions under N.C. Gen. Stat. § 1A-1, Rule 11 against the other. They ultimately agreed to dismiss their Rule 11 motions.

> or not there's actually a pending Rule 11 motion against Ms. Watson, since that's not how the pleading is titled, if -- all of this is going to continue to be pursued; okay?

The trial court was in the best position to evaluate the merits and sincerity of the claims of both parties and to determine whether Mother was acting in good faith. *See Hall v. Hall*, 188 N.C. App. 527, 530, 655 S.E.2d 901, 903 (2008) ("This Court has recognized that the trial judge is in the best position to make such a determination as he or she can detect tenors, tones and flavors that are lost in the bare printed record read months later by appellate judges." (quotation marks omitted)). The challenged finding and conclusion regarding good faith are based on competent evidence. The trial court properly concluded that the parties' dispute as to custody was genuine, and Mother acted in good faith.

IV. Insufficient Means to Defray the Expense of the Case

[2] Father next argues "that at all times, [Mother] was able to employ counsel to meet [Father] on a level playing field without the award of attorney's fees." Father challenges the court's finding that Mother had "insufficient means to defray the expense of this suit" and related conclusion:

> 6. Mother has insufficient means to defray the expense of the custody and child support action, including attorney's fees as provided in N.C.G.S. §50-13.6.

Yet Father does not challenge the trial court's related findings of fact upon which this conclusion is based:

> 15. When this action was initiated by Father in 2013, Mother had worked for about half of the year, and earned approximately $20,000.00. Subsequent to 2013, she has earned gross income of approximately $40,000.00 per year.
>
> 16. Mother also received $1,800.00 per month in alimony in 2013, and has received child support under the terms of a Separation Agreement, and then under the terms of the permanent child support Order entered September 28, 2015.
>
> 17. The Court does not consider it appropriate to consider the fact that Mother has money for child support as it would not be appropriate for her to have to deplete her monthly child support allotment in order to pay attorney's fees.

18. Father, on the other hand, earns approximately $30,000.00 per month.

19. Mother has incurred substantial fees from Mr. Myers for the various issues that he has represented her on (child custody and child support).

. . . .

25. The Court finds that the complexity of the case, the amount of discovery that was required in order to proceed with this case, and the number of hearing [sic] that these particular issues have required is all something the Court considers in determining what would be a reasonable attorney's fee.

. . . .

29. Mother received $10,000.00 from her parents, and that while the Court does find that she does have some resources with which to pay attorney's fees, she should not have to deplete her estate, little that it is, or that she should have to deplete her monthly income in order to be able to pay attorney's fees to meet Father in this litigation.

30. Arguments were made by Father's attorney, and the Court has considered the arguments that this was a de facto "pro bono" attorney-client relationship where Mother was running up thousands of dollars of attorney's fees, but that she had an agreement with her attorney to pay $100.00 per month; the Court does not find that this is a pro bono arrangement.

31. Based on what the Court deems to be reasonable attorney's fees and considering the findings that I have made, the Court finds that a reasonable attorneys fee for custody and child support for Father to pay to Mother is $45,000.00 of the almost $75,000.00 that Mother is requesting.

"A party has insufficient means to defray the expense of the suit when he or she is unable to employ adequate counsel in order to proceed as litigant to meet the other spouse as litigant in the suit." *Dixon v. Gordon*, 223 N.C. App. 365, 372, 734 S.E.2d 299, 304 (2012). Here, Father does not dispute that Mother's estate is significantly smaller than his own and that there is a large disparity in the income between Mother and Father. Mother's income was approximately $40,000.00 per year

when Father filed the complaint in 2013, and Father earns approximately $30,000.00 per month. In addition, Mother filed for bankruptcy in 2015, and she testified at the trial on attorney's fees that she only had $500.00 in her savings account. The challenged finding is based on competent evidence, and we conclude the trial court did not err in that Mother "has insufficient means to defray the expense of the suit."

V. Amount of Attorney's Fees

[3] Finally, Father argues that the amount of the attorney's fees is an abuse of discretion "as the facts and Record of this case do not support the Trial Court's erroneous finding that '[Mother] has conducted herself as [sic] reasonable party acting in good faith[.]' " This is not a new argument but merely repeats the argument Father made earlier in his brief. It is well settled that the amount of attorney's fees is within the trial court's discretion and is reviewed for an abuse of discretion. *See Schneider*, ___ N.C. App. at ___, 807 S.E.2d at 166. The trial court found Mother's attorney's rate to be reasonable, and only awarded $45,000.00 out of approximately $75,000.00 that Mother requested. The trial court considered and rejected Father's argument that Mother's counsel did not really expect to be paid and addressed only the fees attributable to the pending motions, as provided by the consent order. The trial court acted well within its discretion in awarding the attorney's fees.

VI. Conclusion

For the foregoing reasons, we affirm the trial court's award of attorney's fees.

Affirmed.

Judges DILLON and BERGER concur.

CREWS v. CREWS

[264 N.C. App. 152 (2019)]

LISA DAWN CREWS, PLAINTIFF
v.
JAMES SCOTT CREWS, DEFENDANT

No. COA18-42

Filed 5 March 2019

1. Specific Performance—separation agreement—alimony—missed payments—adequacy of remedy at law

In an action alleging breach of a separation agreement, the trial court did not abuse its discretion by entering an order of specific performance directing a husband to pay alimony, where the husband stopped paying alimony, clearly establishing the inadequacy of the remedy of damages and thereby necessitating an equitable remedy.

2. Specific Performance—separation agreement—alimony—ability to pay

In an action alleging breach of a separation agreement, the trial court did not abuse its discretion by entering an order of specific performance directing a husband to pay alimony, even though the order did not contain specific findings of fact regarding the husband's ability to pay, where evidence was presented that the husband was gainfully employed in a profitable business at the time of the hearing, and the husband did not present any evidence to the contrary.

3. Specific Performance—separation agreement—defense against failure to pay alimony—allegation of material breach by complaining party

In an action alleging breach of a separation agreement, the Court of Appeals rejected the husband's argument that an order of specific performance requiring him to pay alimony was erroneous based on the wife's own material breach of the agreement. The trial court did order the wife to return certain vehicles to the husband after determining that her prior failure to return them did not constitute a material breach, and it correctly concluded that the wife performed her other obligations under the agreement.

4. Appeal and Error—breach of separation agreement—denial of summary judgment—no review

In an appeal from an order of specific performance directing a husband to pay alimony after his failure to pay pursuant to a

separation agreement, the Court of Appeals rejected the husband's attempt to challenge the trial court's denial of his motion for summary judgment, because denial of summary judgment is not subject to appellate review after a full evidentiary hearing.

5. Divorce—separation agreement—cohabitation—sufficiency of findings of fact

In an action alleging breach of a separation agreement, the trial court's findings of fact, supported by evidence, adequately addressed allegations that the wife cohabited with another man and included the trial court's determination as to which pieces of evidence the court found credible or not credible. The trial court resolved the conflicts in the evidence and did not merely recite the evidence in its findings.

Judge BERGER concurring in part and dissenting in part.

Appeal by defendant from order entered 19 July 2017 by Judge J. Rodwell Penry, Jr. in District Court, Davidson County. Heard in the Court of Appeals 17 October 2018.

Jon W. Myers, for plaintiff-appellee.

Woodruff Law Firm, P.A., by Jessica S. Bullock and Carolyn J. Woodruff, for defendant-appellant.

STROUD, Judge.

Defendant appeals an order enforcing the Separation Agreement he had entered into with plaintiff. Because the trial court's findings support its conclusions regarding the enforceability of the Separation Agreement and its order requiring specific performance of Husband's alimony obligation, we affirm.

I. Background

On 21 July 2016, plaintiff-wife filed a verified complaint against defendant-husband alleging that the parties had separated in February of 2016 and had entered into a Separation and Property Settlement agreement on 4 March 2016. Wife alleged Husband had breached the Agreement by failing to timely pay his alimony obligation and that he had paid only once or twice since entry of the Agreement. On 25 January 2017, Husband answered Wife's complaint, denying the substantive

allegations; he counterclaimed for rescission of the Agreement based upon fraud in the inducement, material breach of contract by Wife, and attorney fees. Husband alleged Wife had concealed sexual relationships and failed to disclose material assets. Husband alleged duress, unfairness, and unconscionability as to the Agreement. Husband also alleged that even if the Agreement was valid, his obligation to pay alimony was terminated by Wife's cohabitation with another man. Husband claimed Wife had breached the Agreement by her failure to return twenty items of personal property which were listed in the counterclaim.

On 30 March 2017, Husband filed a motion for summary judgment. The trial court denied Husband's motion for summary judgment and heard all pending claims and counterclaims. On 19 July 2017, the trial court entered an order denying summary judgment; concluding that the Separation Agreement was enforceable, Husband had breached the Agreement, and Wife had not breached the Agreement; and ordering specific performance of Husband's alimony obligation. Husband appealed.

II. Specific Performance

Defendant makes three arguments regarding specific performance. Husband does not challenge the findings of fact as unsupported by the evidence, but contends that the findings of fact are not sufficient to support the trial court's conclusions of law. " The remedy of specific performance rests in the sound discretion of the trial court and is conclusive on appeal absent a showing of a palpable abuse of discretion." *Lasecki v. Lasecki*, 246 N.C. App. 518, 540, 786 S.E.2d 286, 302 (2016) (citation, quotation marks, and brackets omitted).

> To receive specific performance, the law requires the moving party to prove that (i) the remedy at law is inadequate, (ii) the obligor can perform, and (iii) the obligee has performed her obligations. We now elaborate on each of these requirements.
>
> First, the movant must prove the legal remedy is inadequate. In *Moore*, our Supreme Court clarified that:
>
> > an adequate remedy is not a partial remedy. It is a full and complete remedy, and one that is accommodated to the wrong which is to be redressed by it. It is not enough that there is some remedy at law; it must be as practical and as efficient to the ends of justice and its prompt administration as the remedy in equity.

For separation agreements, *Moore established that damages are usually an inadequate remedy* because:

> the plaintiff must wait until payments have become due and the obligor has failed to comply. Plaintiff must then file suit for the amount of accrued arrearage, reduce her claim to judgment, and, if the defendant fails to satisfy it, secure satisfaction by execution. As is so often the case, when the defendant persists in his refusal to comply, the plaintiff must resort to this remedy repeatedly to secure her rights under the agreement as the payments become due and the defendant fails to comply. The expense and delay involved in this remedy at law is evident.

In this context, *even one missed payment can indicate the remedy at law is inadequate.*

Second, the movant must prove the obligor has the ability to perform. To meet this burden, the movant need not necessarily present direct evidence of the obligee's current income. For instance, the movant can meet her burden by showing the obligee has depressed his income to avoid payment. Additionally, if the obligor has offered evidence tending to show that he is unable to fulfill his obligation under a separation agreement, the trial judge must make findings of fact concerning the defendant's ability to carry out the terms of the agreement before ordering specific performance.

Third, the movant must prove she has not breached the terms of the separation agreement. Still, general contract principles recognize that immaterial breaches do not eliminate the possibility of specific performance.

Reeder v. Carter, 226 N.C. App. 270, 275–76, 740 S.E.2d 913, 917–18 (2013) (citations, quotation marks, ellipses, and brackets omitted). Defendant challenges all prongs supporting the trial court's order of specific performance.

A. Inadequate Remedy at Law

[1] Husband contends that "the remedy of damages is the only remedy available because the defendant cannot perform under the contract. Additionally, there are no findings of fact or conclusions of law that the remedy of damages is inadequate." (Original in all caps.) As noted

above, for separation agreements, "damages are usually an inadequate remedy[.]" *Id.* at 275, 740 S.E.2d at 918. In *Stewart v. Stewart*, this Court determined,

> *The breachor's initial failure to comply establishes the inadequacy of the breachee's remedy at law.* To make iteration of breach prerequisite to equitable relief would afflict the equitable remedy with the very inadequacy it was designed to amend. Given plaintiff's allegation regarding defendant's statement of intent not to comply, and defendant's failure to make a payment when due, we find no abuse of the court's discretion in ordering specific performance.

61 N.C. App. 112, 117, 300 S.E.2d 263, 266 (1983) (emphasis added).

Here, plaintiff's evidence showed and the trial court found that Husband had failed to pay his alimony obligation multiple times. Husband cites to *Reeder* to argue "that there must be findings of fact to support conclusion of law on the prong of legal remedy being inadequate[;]" it appears Husband contends that the trial court must include the magic words that "the legal remedy is inadequate" in its findings. But *Stewart* establishes that a finding of a "failure to comply establishe[d] the inadequacy of" the remedy at law. *Id.* Here, the trial court made a finding that "[t]he Defendant stopped paying alimony in August of 2016" in its July 2017 order; this finding established the inadequacy of Wife's remedy at law. *See id.*

B. Husband's Ability to Perform under the Agreement

[2] Husband also contends that "the trial court erred by failing to make any findings of fact or conclusions of law whatsoever regarding specific performance or defendant's ability to pay alimony." (Original in all caps.)

> As a general proposition, the equitable remedy of specific performance may not be ordered unless such relief is feasible; therefore courts may not order specific performance where it does not appear that defendant can perform. In the absence of a finding that the defendant is able to perform a separation agreement, the trial court may nonetheless order specific performance if it can find that the defendant has deliberately depressed his income or dissipated his resources.
>
> In finding that the defendant is able to perform a separation agreement, the trial court is not required to

> make a specific finding of the defendant's present ability to comply as that phrase is used in the context of civil contempt. In other words, the trial court is not required to find that the defendant possesses some amount of cash, or asset readily converted to cash prior to ordering specific performance.

Condellone v. Condellone, 129 N.C. App. 675, 682–83, 501 S.E.2d 690, 695–96 (1998) (citations, quotation marks, and brackets omitted).

Husband is correct that the trial court did not make specific findings of fact or conclusions of law regarding his ability to specifically perform the contract by paying the alimony. There was never any question of Husband's ability to pay raised at trial and the evidence tended to show his business was successful and profitable. In fact, one of Husband's counterclaims – which was rejected by the trial court in finding of fact 8 – was based upon his allegation that Wife had breached the "Molestation Clause" of the agreement and that she was trying to damage his business. In the Agreement, Husband received the business he established and operated, Quality Transportation and Transports. One of Husband's counterclaims was based upon his allegation that Wife had breached the agreement by harassing him and threatening to contact his customers and "ruin [his] business[.]" Husband testified about his business, including his relationships with Foreign Cars Italia and Bentley; his business transported foreign cars for "high-end customers" and Husband believed Wife was contacting them and trying to "blackmail" him. Husband did not present any evidence of any actual financial damage to his business – although his failure to file income tax returns for nine to ten years may have made it difficult to establish anything about his business's financial status – and he did not give any financial reason for stopping his alimony payments in August of 2016 but rather relied upon the allegations of fault on the part of plaintiff in his defense. At the time of the hearing, Husband was still operating his business as he had done for many years. When asked how much he had paid his attorneys in this case, he replied that he wasn't sure, but he had borrowed $65,000, $40,000 of which was from a "handshake deal" with his girlfriend, and did not use all of that money for his attorney fees.

Even if Wife did not present any specific evidence of Husband's income at the time of the hearing, the evidence showed he was still gainfully employed exactly as he had been for most of their marriage. And most significantly, Husband did not present any evidence of his *inability* to pay or even argue that he was unable to pay. Instead, Husband's entire defense relied upon trying to set aside the Agreement based on fraud or

duress and his defense of Wife's cohabitation. Wife had the burden to present evidence that Husband had the ability to pay, which she met by the evidence noted above. Husband did not counter that evidence and did not make any *argument* to the trial court regarding his ability to pay or Wife's alleged failure to present sufficient evidence of his inability to pay. He has improperly raised this argument for the first time on appeal. *See Lee v. Keck*, 68 N.C. App. 320, 328, 315 S.E.2d 323, 329 (1984) ("Even the sufficiency of the evidence cannot be raised for the first time on appeal. On appeal, defendants argue several grounds, including the sufficiency of the evidence, which were not advanced at trial. They are, therefore, not properly before this Court." (citations omitted)).

While Husband and the dissent rely on *Cavenaugh* in support of the argument that the trial court was required to make findings of fact regarding his ability to pay, Husband omitted the intalicized portion below in his quote from the holding he cited:

> We hold that *when a defendant has offered evidence tending to show that he is unable to fulfill his obligations under a separation agreement or other contract* the trial judge must make findings of fact concerning the defendant's ability to carry out the terms of the agreement before ordering specific performance. Because the trial judge did not make such findings in this case, he could not have properly exercised his discretion in decreeing specific performance of the separation agreement and ordering payment of arrearages. Therefore, this case must be remanded for additional findings of fact on defendant's ability to pay the arrearages and to comply with the terms of the separation agreement in the future. If the trial judge finds that defendant is unable to fulfill his obligations under the agreement, specific performance of the entire agreement may not be ordered absent evidence that defendant has deliberately depressed his income or dissipated his resources. If he finds that the state of defendant's finances warrants it, the trial judge may order specific performance of all or any part of the separation agreement unless plaintiff otherwise has an adequate remedy at law.

Cavenaugh v. Cavenaugh, 317 N.C. 652, 657-58, 347 S.E.2d 19, 23 (1986) (emphasis added) (citations omitted). Husband did not "offer[ ] evidence tending to show that he is unable to fulfill his obligations under [the] separation agreement or other contract[,]" *id.*, nor did he make this

argument to the trial court. *See Lee*, 68 N.C. App. as 328, 315 S.E.2d as 329. This argument is without merit.

C. Wife's Performance under the Agreement

[3] Last, Husband argues Wife "did not perform her obligations under the contract." This argument is commingled with Husband's argument regarding material breach of contract. Husband contends "the trial court erred by finding that . . . [Wife] did not materially breach the parties' separation agreement by failing to return [Husband's] one-of-a-kind Ferrari model cars and at least $5,400 of other personal property items[.]" (Original in all caps.) "In order for a breach of contract to be actionable it must be a material breach, one that substantially defeats the purpose of the agreement or goes to the very heart of the agreement, or can be characterized as a substantial failure to perform." *Long v. Long*, 160 N.C. App. 664, 668, 588 S.E.2d 1, 4 (2003).

The Agreement addressed the division of "Miscellaneous Tangible Property" and provided that Husband would receive his "tools, four wheeler, golf cart and washer/dryer and personal effects including his clothing." Husband was also to get such other items "as the parties mutually agree." Since the model cars are not specifically mentioned in the Agreement, Husband and Wife apparently agreed after signing the Agreement that Husband would get the cars. The "one-of-a-kind Ferrari model cars" Husband claims are worth $22,500 were not mentioned in the Agreement. If the cars were so important that they "defeat the purpose of the" Agreement as Husband contends, they should have been specifically listed; otherwise, Wife could have refused to allow Husband to have the cars. "[R]escission of a separation agreement requires proof of a material breach -- a substantial failure to perform." *Cator v. Cator*, 70 N.C. App. 719, 722-23, 321 S.E.2d 36, 38 (1984). The trial court ultimately ordered Wife to return the cars to Husband but determined that she did not breach the Agreement by her failure to return them. Furthermore, the trial court correctly determined that Wife had performed her other obligations under the Agreement. Husband's argument as to Wife's material breach as a bar to her claims for specific performance and breach of contract is overruled.

III. Summary Judgment

[4] Husband next contends that "the trial court erred in (a) preserving ruling until after trial on the defendant-appellant's motion for summary judgment and (b) by denying defendant's motion for summary judgment." (Original in all caps.) But denial of summary judgment is not subject to appellate review after a full evidentiary hearing:

> To grant a review of the denial of the summary judgment motion after a final judgment on the merits, however, would mean that a party who prevailed at trial after a complete presentation of evidence by both sides with cross-examination could be deprived of a favorable verdict. This would allow a verdict reached after the presentation of all the evidence to be overcome by a limited forecast of the evidence. In order to avoid such an anomalous result, we hold that the denial of a motion for summary judgment is not reviewable during appeal from a final judgment rendered in a trial on the merits.

Harris v. Walden, 314 N.C. 284, 286, 333 S.E.2d 254, 256 (1985).

IV. Cohabitation

[5] Husband next contends the trial court erred in failing to determine Wife was cohabiting with another man. While Husband does claim to challenge the findings of facts regarding cohabitation as unsupported by the competent evidence, Husband actually focuses less on a lack of evidence and instead asks us to reweigh the evidence in his favor, which we cannot do. *See Garrett v. Burris*, 224 N.C. App. 32, 38, 735 S.E.2d 414, 418 (2012), *aff'd per curiam*, 366 N.C. 551, 742 S.E.2d 803 (2013) ("It is not the function of this Court to reweigh the evidence on appeal."). "Where evidence of cohabitation is conflicting, the trial court must evaluate the parties' subjective intent." *Craddock v. Craddock*, 188 N.C. App. 806, 812, 656 S.E.2d 716, 720 (2008). The trial court found:

> 10. Based upon the evidence independent of Lisa Crews and Mr. Henderson, the Court concludes they were not cohabitating pursuant to N.C.G.S. § 50-16.9(b).
>
> 11. There was no evidence of joint financial obligations of a home, combining finances, pooling of resources or consistent merging of families.
>
> 12. The court does not [find] that there was a dwelling together continuously and habitally.
>
> . . . .
>
> 14. The Plaintiff took a weekend trip to Chicago to see a male friend. There was no evidence of a sexual relationship other than a statement by Mr. Henderson when he had been cast aside by Lisa Crews which the Court puts no credence in his statement.

The trial court specifically noted the evidence it found credible and the evidence which was not credible. Husband is correct that Mr. Henderson had said he was living with Wife at one point, but the trial court put "no credence in his statement." Ultimately, the trial court made its findings on the evidence it deemed credible; those findings are supported by the evidence and we do not review the trial court's determinations of credibility. *See In re C.J.H.*, 240 N.C. App. 489, 493, 772 S.E.2d 82, 86 (2015) ("It is the duty of the trial judge to consider and weigh all of the competent evidence, and to determine the credibility of the witnesses and the weight to be given their testimony. If the trial court's findings of fact are supported by ample, competent evidence, they are binding on appeal, even though there may be evidence to the contrary." (citations and quotation marks omitted)). The trial court resolved any conflicts in the evidence in favor of Wife, and even if the trial court could have reached a different conclusion, the trial court's findings are supported by the evidence.

Husband also contends

> the trial court found that "Mr. Henderson told third parties that they were living together when he was mad at Lisa Crews because they broke up, but later indicated that was a lie." (R p 157). Mere recitations of a witness's testimony are not findings of fact to support the court's conclusions of law. *Schmeltzle v. Schmeltzle*, 147 N.C. App. 127, 555 S.E.2d 326, 328 (2001).

But Husband's argument takes this finding out of context. This finding is in a list of 15 findings addressing the issue of cohabitation. The other findings address surveillance of plaintiff's residence on several occasions and other facts relevant to the issue of cohabitation and then indicate that the trial court did not find Mr. Henderson to be credible: "Mr. Henderson and [Plaintiff] often had contradicting testimony of their own facts and made it extremely difficult for the court to r[e]ly on anything they said." Because the trial court did not find Mr. Henderson's or plaintiff's testimony to be credible, the trial court also found that it based its conclusions "upon the evidence *independent of* [Plaintiff] and Mr. Henderson[.]" The trial court's findings clearly resolve the factual issues and are not merely recitations of evidence. This argument is overruled.

V. Conclusion

For the foregoing reasons, we affirm.

AFFIRMED.

Judge DILLON concurs.

Judge BERGER concurs in part and dissents in part in separate opinion.

BERGER, Judge, concurring in part, dissenting in part in separate opinion.

Because the trial court's order of specific performance should be vacated and the matter remanded for a new hearing, I respectfully dissent. I concur in the remainder of the majority opinion.

In April, a two-day hearing was conducted in Davidson County District Court that focused on many aspects of the parties' separation agreement. The primary focus of this hearing was breach of contract and rescission of the separation agreement. The hearing did not address specific performance.

> To receive specific performance, the law requires the moving party to prove that [(i)] the remedy at law is inadequate, [(ii)] the obligor can perform, and [(iii)] the obligee has performed [her] obligations. 3 Suzanne Reynolds, *Lee's North Carolina Family Law* § 14.35 (5th ed. 2002).
>
> . . . .
>
> [Therefore,] the movant must prove the obligor has the ability to perform. To meet this burden, the movant need not necessarily present direct evidence of the obligee's current income.

Reeder v. Carter, 226 N.C. App. 270, 275-76, 740 S.E.2d 913, 917-18 (2013) (citation and quotation marks omitted).

Over the course of the two-day hearing, the term specific performance was not mentioned by any party, attorney, or the trial court. In more than five hundred pages of testimony and proceedings recorded in the transcript of hearing, neither inadequate remedy at law nor ability to perform were uttered by any party, attorney, or the trial court. It is peculiar then that the majority is able to divine the necessary findings of fact to support an order of specific performance from a proceeding that, based upon the transcript, had nothing to do with specific performance.

The trial court's order wholly fails to address or otherwise mention adequacy of legal remedies. More striking, however, is the complete

absence of any mention in the record concerning Defendant's ability to perform. There is no evidence in the record to support a finding of fact that Defendant had the ability to perform and there is no finding of fact by the trial court regarding Defendant's ability to perform. While magic words may not be necessary, evidence is.

The majority justifies its result by simply stating that "the evidence tended to show [Defendant's] business was successful and profitable." The majority, however, fails to support this conclusory statement with any evidence or citation to the record. The fact that someone is deemed successful in his or her employment is purely subjective. And, while technically, even a minimal profit makes a venture profitable, the majority fails to state what evidence it relied on to make such a concrete statement.

Even if we assume that this was a hearing on specific performance and that there was evidence presented of Defendant's ability to perform when the parties separated, there was no evidence presented about Defendant's ability to perform at the time of the hearing. *See Cavenaugh v. Cavenaugh*, 317 N.C. 652, 657, 347 S.E.2d 19, 23 (1986); *Condellone v. Condellone*, 129 N.C. App. 675, 682-83, 501 S.E.2d 690, 695-96 (1998). On this point, the majority is silent.

In addition, the majority impermissibly shifts the burden on ability to perform from Plaintiff, as obligee, to Defendant, as obligor. Plaintiff here was required to produce some evidence that Defendant had the ability to perform at the time of the hearing. Plaintiff failed to present any evidence to support such a finding or conclusion.

The majority acknowledges this shortcoming at trial by stating that "[t]here was never any question of Husband's ability to pay raised at trial." That is the problem with Plaintiff's claim for specific performance and the majority opinion: *Plaintiff* was required to "prove the obligor has the ability to perform." *Reeder*, 226 N.C. App. at 276, 740 S.E.2d at 918. The fact that ability to perform was not raised at the hearing runs counter to the majority's reasoning. In the absence of any evidence by the Plaintiff of Defendant's ability to perform, Defendant was not required to show inability to pay as the majority contends.

However, the majority discusses evidence presented by Defendant concerning Plaintiff's efforts to damage Defendant's business interests, but concludes that "Husband did not present any evidence of actual financial damage to his business[.]" It would be interesting to see the outcome of this case if the majority applied such a critical approach Plaintiff's case in chief.

SANDRA J. DONNELL-SMITH AND HUSBAND, LANGSTON SMITH, PETITIONERS
v.
RUSSELL E. MCLEAN, UNMARRIED, ET ALS.; RESPONDENTS

No. COA18-613

Filed 5 March 2019

1. Appeal and Error—preservation of issues—partition by sale—appellant limited to stated exceptions

In an action to partition real property that had been distributed to eleven children in equal shares, respondent waived an argument on appeal that the superior court failed to conduct a proper inquiry to support a partition by sale, a ground that he did not state when he excepted to the commissioners' report on dividing the property. Although respondent was not required to state specific grounds for his exception, he alleged an unequal allocation of the value of the property or timber, but he argued a different basis in the hearing before the clerk.

2. Partition—partial sale—consent by parties—abuse of discretion analysis

In an action to partition real property that had been distributed to eleven children in equal shares (but after subsequent transfers and acquisitions belonged to sixteen tenants in common with unequal shares), the trial court did not abuse its discretion in confirming a partial sale of 2.27 acres of an approximately 102-acre lot (with the remainder partitioned in kind), where all parties were included in the action and expressly consented to the in-kind division of the larger tract. It was reasonable for the court to consider the express consent to include consent to the sale of the separated 2.27-acre tract. Moreover, since the smaller tract had not yet been sold, the party challenging the sale could purchase the tract and still be entitled to his portion of the sale proceeds as a tenant in common owner of that tract.

3. Partition—unequal partition—based on allocated shares—value of whole

In an action to partition real property that had been distributed to eleven children in equal shares (but after subsequent transfers and acquisitions belonged to sixteen tenants in common with unequal shares), the trial court did not abuse its discretion in confirming the commissioners' report, which detailed the method by which the property was valued, and which demonstrated that the

valuation of the land was consistently applied to all tracts during the division of the property according to each party's interest. Even though the tracts were valued differently, the commissioners took into account various factors affecting value, including timber, structures, and road access that differed between tracts. The Court of Appeals rejected respondent's argument that the commissioners should have considered the post-division value of each tract.

4. Partition—report by commissioners—confirmation by clerk—review by superior court

In an action to partition real property that had been distributed to eleven children in equal shares, the trial court did not abuse its discretion when it confirmed the commissioners' report recommending partition in kind and partial sale, where the commissioners testified at the hearing regarding their methodology used to divide the property, many of the parties gave testimony and were given an opportunity to ask questions, and the challenging party (respondent) did not testify and presented only one witness. The trial court made specific findings of fact and conclusions of law in support of its ruling.

Appeal by respondent Russell E. McLean from judgment entered 20 November 2017 by Judge Richard T. Brown in Harnett County Superior Court. Heard in the Court of Appeals 31 January 2019.

Ryan McKaig and Joseph L. Tart for petitioner-appellees.

Johnson and Johnson, P.A., by Rebecca J. Davidson, for respondent-appellant Russell E. McLean.

TYSON, Judge.

Russell E. McLean ("Respondent") appeals from an order confirming the commissioners' report dividing partitioned property among the tenants in common. We affirm the superior court's order.

I. Background

At the time of her death in 1987, Mettie McLean owned approximately 102 acres in fee simple situated in Harnett County (the "property"). Petitioners filed a petition for partition on 28 April 2011, alleging the property was devised to ten of Mettie's children, in equal shares. Petitioners requested the clerk to divide the land in kind and to appoint

commissioners to allocate the partitioned property in accordance with the individual interests.

In their amended petition for partition, Petitioners alleged Mettie had died intestate, as no original will was found, thus the property was distributed among all eleven children, in equal shares. Petitioners noted that since Mettie's death, "some of the undivided interest has been transferred by deed, devise, and intestate succession to other tenants in common." Petitioners requested the clerk of superior court to appoint a commissioner to sell approximately 1.66 acres of the property lying on the north side of McDougald Road, which was separate and divided from the rest of the acreage, and to apply the proceeds from that sale to the costs of the partition proceedings. Petitioners also requested for a guardian *ad litem* to be appointed to represent unknown potential claimants.

In their second amended petition for actual partition and partition by sale, Petitioners identified several additional parties to the proceedings and specified sixteen tenants in common, each owning various shares of the eleven interests. Petitioners again requested for the clerk to appoint a commissioner to sell the separate 1.66 acres tract to pay for the costs of the partition, and to appoint commissioners to divide the land in kind among the tenants in common.

On 11 August 2015, Petitioners filed a motion for sale of the 1.66 acres and a motion for partition in kind of the remaining 98.34 acres. After a hearing, the clerk of superior court filed a written order on 10 November 2015. The clerk found Mettie McLean had died intestate, leaving eleven equal shares of the property, which had been subject to further transfers since her death. The clerk concluded:

> 4. The listed tenants are entitled to the allotment of their interests in severalty as follows:
>
> a. 4/22nd to Sandra Donnell-Smith;
>
> b. 7/22nd to Russell Eugene McLean;
>
> c. 4/22nd to Florence Elaine McLean Lyons; and
>
> d. 1/22nd to Aaron Thomas.
>
> 5. Under N.C. Gen. Stat. § 46-13, the listed co-tenants, two or more tenants in common have requested the court to authorize the commissioners to allot their several shares to them in common, as one parcel, evidenced by their consent to the entry of this order.

e. 2/22nd in common, as one parcel, to William McLean, who will hold a 1/4th interest in the share; Liddell R. McLean, Jr., who will hold a 1/2 interest in the share; and to Shirley McLean Carter, who will own a 1/4th interest in the share;

f. 2/22nd in common, as one parcel, to David P. Raymond, Carol A. Williams, and Edward Raymond, who will hold said share in equal interests; and

g. 2/22nd to Andree Lessey, Kevin Callaway, and Lisa Atkinson, in common, as one parcel, who will hold said share in equal interests.

The clerk also allowed for each party to submit special requests concerning the division of the property. Several of the parties submitted special requests, including Respondent. Respondent requested "as much open cropland as possible" and "[i]f feasible . . . to join property of [his] sole surviving sibling." These requests to the commissioners were non-binding.

The commissioners were appointed, and, after consultations with a surveyor and a forestry expert, they filed their report on 31 March 2017. The report identified 2.27 acres, originally believed to be 1.66 acres, in the separated tract on the north side of McDougald Road to be sold, and the remainder of the property was apportioned in kind, based upon each party's interest in the property, in accordance with the clerk's conclusions and order. The proposed division of the property was indicated on plats and surveys attached to the report. Respondent was allocated the largest portion, which contained 36.64 acres and the greatest amount of open crop land, but did not adjoin the property line of the 4.27 acre share allotted to his sister.

Respondent filed an exception to the report on 10 April 2017. In his exception, Respondent alleged the report did not "divide land and timber in accordance with the respective interests of the tenants in common[.]" Following a hearing, the clerk confirmed the report on 9 August 2017.

Respondent appealed to the superior court. After a *de novo* hearing, the superior court confirmed the report. Respondent timely appealed.

II. Jurisdiction

An appeal of right lies with this Court pursuant to N.C. Gen. Stat. § 7A-27(b)(1) (2017).

III. Issue

Respondent argues the superior court abused its discretion in confirming the report of the commissioners.

IV. Standard of Review

For a trial without a jury,

> the standard of review on appeal is whether there was competent evidence to support the trial court's findings of fact and whether its conclusions of law were proper in light of such facts. Findings of fact by the trial court in a non-jury trial have the force and effect of a jury verdict and are conclusive on appeal if there is evidence to support those findings. A trial court's conclusions of law, however, are reviewable *de novo*.

Lyons-Hart v. Hart, 205 N.C. App. 232, 235, 695 S.E.2d 818, 821 (2010) (citation omitted). "[W]hether a partition order and sale should [be] issue[d] is within the sole province and discretion of the trial judge and such determination will not be disturbed absent some error of law." *Whatley v. Whatley*, 126 N.C. App. 193, 194, 484 S.E.2d 420, 421 (1997) (citation omitted).

V. Analysis

A. Waiver of Review

[1] Respondent first argues the superior court erred by not conducting the proper inquiry to support a partition by sale. Petitioners contend Respondent has waived this argument on appeal.

Any tenant in common has the right to petition for partition of the shared real estate. N.C. Gen. Stat. § 46-3 (2017). Upon petition, the clerk of superior court appoints three disinterested commissioners to divide the property. N.C. Gen. Stat. § 46-7 (2017). Any party may make an exception to the commissioners' report within ten days. N.C. Gen. Stat. § 46-19(a) (2017). The statute does not require an exception to be specific or state specific grounds. *Jenkins v. Fox*, 98 N.C. App. 224, 226, 390 S.E.2d 683, 684 (1990). If an exception is filed, "whether the report of the commissioners should be confirmed is for determination by the clerk and, upon appeal from his order, by the judge." *Allen v. Allen*, 258 N.C. 305, 307, 128 S.E.2d 385, 386 (1962) (emphasis omitted).

When a partition proceeding is appealed to the superior court, the court is not limited in its review to only the actions of the clerk. *Langley*

v. Langley, 236 N.C. 184, 186, 72 S.E.2d 235, 236 (1952). Rather, the court may "*review the report in the light of the exceptions filed*, hear evidence as to the alleged inequality of division, and render such judgment, within the limits provided by law, as [it] deemed proper under all the circumstances made to appear to him." *Id.* (emphasis supplied).

Though Respondent was not required to state specific grounds for his exception, he did so. He took exception to the report for its purported failure to divide the property and timber "in accordance with the respective interests of the tenants in common." At the hearing before the clerk, Respondent testified he excepted to the division "because the tract allotted to him fails to adjoin the land he owned outside the division." Respondent presented no evidence concerning, or to dispute, the allocation or value of the property or timber. After considering "Respondent's testimony, the documents on file, and the arguments of the attorneys," the clerk found the division to be fair and confirmed the report.

The clerk, and later the superior court, considered whether the commissioners' report should be confirmed in light of the noted exception. *See Langley*, 236 N.C. at 186, 72 S.E.2d at 236. Respondent expressly excepted and sought review of the purported inequality of the division of the property and may not swap his position on appeal. *See Cushman v. Cushman*, 244 N.C. App. 555, 562, 781 S.E.2d 499, 504 (2016). Respondent's argument is dismissed.

B. Abuse of Discretion

1. Partial Sale

[2] Even if Respondent had preserved his argument on partial sale, we find no abuse of discretion in the superior court's order.

Under Chapter 46 of the General Statutes, any "actual partition may be made of a part of the land sought to be partitioned and a sale of the remainder; or a part only of any land held by tenants in common, or joint tenants, may be partitioned and the remainder held in cotenancy." N.C. Gen. Stat. § 46-16 (2017).

In *Brooks v. Austin*, a widow had signed an antenuptial agreement, which entitled her to a child's share of her husband's estate, in lieu of dowager allowance. 95 N.C. 474, 475 (1886). Heirs of the decedent petitioned for partition by sale of the land, with the proceeds to be divided among the tenants in common. *Id.* The issue on appeal was whether this antenuptial agreement was binding. *Id.* at 477. Our Supreme Court

affirmed the widow's waiver of dowager. *Id.* The Supreme Court analyzed the proper partition of the estate. *Id.* at 477-78.

One manner, following N.C. Gen. Stat. § 46-16 and applicable only when all parties are before the superior court, was to divide the estate into several parts, with the residue to be held in common. *Id.* at 478. Then, if all parties were "united," this undivided interest could be sold and the proceeds divided and disbursed according to each party's interest. *Id.*

In *Patillo v. Lytle*, the Supreme Court again acknowledged the applicability of N.C. Gen. Stat. § 46-16 to partial partition in kind. 158 N.C. 92, 95, 73 S.E. 200, 201 (1911). However, as alluded to in *Brooks*, "[t]he actual divisibility of the land into parts is an inquiry to be made before an order of sale [and] can only be legally made when all the tenants [in common] are before the court." *Id.* at 95-96, 73 S.E. at 201. The land at issue in *Patillo* had been sold without the knowledge or consent of several tenants in common. *Id.* at 94, 73 S.E. at 200. The petitioner argued the other parties consented to the sale, but as at least one party claimed no prior knowledge of the sale, the other parties could not "by consent impair the rights of those in interest, who [were] not made parties." *Id.* at 98, 73 S.E. at 202. The sale was ordered to be set aside. *Id.*

In this case, all parties to the action have been properly included and were before the court. Under the application of N.C. Gen. Stat. § 46-22, the property can be divided into several parts. *See Brooks*, 95 N.C. at 478; *Patillo*, 158 N.C. at 95-96, 73 S.E. at 201. Unlike in *Patillo*, there was consent to the partition, as each party, including Respondent, signed a consent order for in kind division of the unitary 98.34 acres more or less. As the entirety of the property is approximately 102 acres, it is reasonable for the court to consider the express consent to in kind division to also include consent to the sale of the separated tract.

Additionally, the sale of the 2.27 acres across the road has not yet occurred. Under the commissioners' report, the property has been divided according to each party's interest, and title to the 2.27 acres remains being held in common. If these 2.27 acres are sold any party can purchase the tract, and after accounting for costs of the partition, each party will be entitled to the remaining proceeds according to his or her respective interest. *See Brooks*, 95 N.C. at 478. Nothing prevents Respondent from purchasing the 2.27 acres, if and when it is sold. Respondent is entitled to his portion of the proceeds at that time, less his portion of the expenses and costs. Respondent has shown no abuse in the superior court's discretion in confirming the division of the property. Respondent's argument is overruled.

2. Unequal Partition of the Property

[3] Respondent argues it was error for the commissioners to divide the property without going back and considering the post-division value of each tract. We disagree.

As required by statute, to partition a tract:

> The commissioners, who shall be summoned by the sheriff, must meet on the premises and partition the same among the tenants in common, or joint tenants, *according to their respective rights and interests therein*, *by dividing the land into equal shares* in point of value as nearly as possible, and for this purpose they are empowered to subdivide the more valuable tracts as they may deem best, and to charge the more valuable dividends with such sums of money as they may think necessary, to be paid to the dividends of inferior value, in order to make an equitable partition.

N.C. Gen. Stat. § 46-10 (2017) (emphasis supplied).

Respondent filed a memorandum of additional authority to support his assertion the commissioners are to consider post-division valuation. His citations to *Robertson v. Robertson*, and *Phillips v. Phillips* are inapplicable to the present case, as both involve partition of land in kind into two equal shares. *Robertson v. Robertson*, 126 N.C. App. 298, 300, 484 S.E.2d 831, 832 (1997); *Phillips v. Phillips*, 37 N.C. App. 388, 392, 246 S.E.2d 41, 44 (1978). In the present case, the partition of the original eleven shares in kind is now based upon unequal shares of ownership through transfers and acquisitions.

The commissioners testified they looked at the value of the whole property and divided that value into 1/22nd interests. The 1/22nd interest was used to assign each party, individually or collectively, the value of their interest. The total value of the property was $345,500, giving each 1/22nd interest a value of $15,704.55. The total value took into account the values of open land; the timbered land and the value of the standing timber; and the house, surrounding structures, and supporting land. The commissioners acknowledged the differences in valuing the property as a whole versus each lot as it was partitioned. For example, the commissioners testified the value of the timber is greater on the property as a whole than what it would be on each individual lot, due to the economy of scale in harvesting or clearing. There is also a difference in value

between lots with access to road frontage and those sharing dedicated easements to the public road.

At oral argument, Respondent's counsel did not dispute the commissioners' pre-division value of the property, but argued the post-division values were not equal. In actuality, few of the values were equal, but this division was not based on equal value, but rather upon the allocated shares of the value of the whole. Respondent had a 7/22nd interest of the whole tract. Two other parties had a 4/22nd interest each. There were three 2/22nd interests, each jointly held by three parties. One party had a 1/22nd interest. While each 1/22nd interest was valued the same, the division of the property was based on the parties' respective interests. N.C. Gen. Stat. § 46-10.

The valuation of the land was consistently applied by the commissioners to all tracts. Each tract was valued differently, even pre-division, due to the factors noted above and the percentage of ownership to be allocated. Respondent's assertion of post-division value is irrelevant to the allocation of interests. Further, if Respondent has appealed because he was unhappy with his tract not adjoining property he already owned or being adjacent to his sibling, such a determination rests within the discretion of the court and will not be upset on appeal without a finding of abuse of discretion. *Robertson*, 126 N.C. App. at 304, 484 S.E.2d at 834.

The evidence in the record supports a conclusion that the property was valued consistently, and the consistent value was applied in dividing the property according to each party's interest. Presuming, *arguendo*, the method used by the commissioners erroneously failed to take into consideration the value of the underlying property after the lots were divided and the value of the acreage within the lots could have varied depending on where they were ultimately positioned, Respondent failed to show an abuse of discretion and presented no evidence to support a finding that the tract he received was less valuable than the share to which he was otherwise entitled. We find no abuse of discretion in the superior court's confirmation of the commissioners' report. Respondent's argument is overruled.

C. De Novo Review by Superior Court

[4] Respondent appears to argue the superior court did not conduct a proper *de novo* review of the commissioners' report and confirmation by the clerk. The question at the *de novo* hearing by the superior court is whether the commissioners' report should be confirmed. *Allen*, 258 N.C. at 307, 128 S.E.2d at 386.

At the hearing, the commissioners all testified regarding their methodology used to divide the property and issue the report. The parties who were present were given the opportunity to ask questions during the course of the hearing, and many of the parties gave testimony in support of confirmation. Respondent did not testify, and only presented one witness. After hearing all the evidence, the superior court made specific findings of fact and conclusions of law regarding the confirmation of the commissioners' report. Respondent has failed to show any abuse of discretion in the superior court's conclusions or decision. Respondent's argument is overruled.

VI. Conclusion

Respondent failed to preserve his argument pertaining to the proposed sale of the undivided 2.27 acres for appellate review. The commissioners properly divided the land into as equal shares as possible, according to the interests of the parties.

We find no abuse of discretion in the superior court's decision to confirm the report of the commissioners. The order appealed from is affirmed. *It is so ordered.*

AFFIRMED.

Judges ZACHARY and COLLINS concur.

LAKE v. STATE HEALTH PLAN FOR TEACHERS & STATE EMPS.

[264 N.C. App. 174 (2019)]

I. BEVERLY LAKE, JOHN B. LEWIS, JR., EVERETTE M. LATTA, PORTER L. McATEER, ELIZABETH S. McATEER, ROBERT C. HANES, BLAIR J. CARPENTER, MARILYN L. FUTRELLE, FRANKLIN E. DAVIS, THE ESTATE OF JAMES D. WILSON, BENJAMIN E. FOUNTAIN, JR., FAYE IRIS Y. FISHER, STEVE FRED BLANTON, HERBERT W. COOPER, ROBERT C. HAYES, JR., STEPHEN B. JONES, MARCELLUS BUCHANAN, DAVID B. BARNES, BARBARA J. CURRIE, CONNIE SAVELL, ROBERT B. KAISER, JOAN ATWELL, ALICE P. NOBLES, BRUCE B. JARVIS, ROXANNA J. EVANS, AND JEAN C. NARRON, AND ALL OTHERS SIMILARLY SITUATED, PLAINTIFFS

v.

STATE HEALTH PLAN FOR TEACHERS AND STATE EMPLOYEES, A CORPORATION, FORMERLY KNOWN AS THE NORTH CAROLINA TEACHERS AND STATE EMPLOYEES' COMPREHENSIVE MAJOR MEDICAL PLAN, TEACHERS' AND STATE EMPLOYEES' RETIREMENT SYSTEM OF NORTH CAROLINA, A CORPORATION, BOARD OF TRUSTEES TEACHERS' AND STATE EMPLOYEES' RETIREMENT SYSTEM OF NORTH CAROLINA, A BODY POLITIC AND CORPORATE, DALE R. FOLWELL, IN HIS OFFICIAL CAPACITY AS TREASURER OF THE STATE OF NORTH CAROLINA, AND THE STATE OF NORTH CAROLINA, DEFENDANTS

No. COA17-1280

Filed 5 March 2019

1. Appeal and Error—interlocutory appeal—substantial right—statutory duties of public entities—state budget

In an action challenging amendments to the State Health Plan (SHP) that removed premium-free options for retired state employees, the Court of Appeals elected to hear an appeal from an order granting partial summary judgment, even though the appeal was interlocutory. The order affected a substantial right by preventing public entities from enforcing statutory provisions related to premiums for health coverage and had the potential to affect the financial stability of the state budget.

2. Public Officers and Employees—State Health Plan amendments—removal of non-contributory benefits—impairment of contract claim

In an action challenging amendments to the State Health Plan (SHP) that removed premium-free options for retired state employees, plaintiffs failed to carry their burden of showing that the SHP statutes created a contractual obligation so as to prevail on their impairment of contract claim. The Court of Appeals considered the issue of first impression whether the SHP created a vested right or contractual obligation similar to pension benefits, and concluded it did not, declining to treat SHP benefits, including non-contributory benefits, as deferred compensation. The plain language of the statutes governing the SHP clearly signaled the legislature's intent that

the statutes give rise to a policy subject to amendment and repeal and did not confer a contractual right on state employees regarding health care insurance benefits.

3. Constitutional Law—state—reduction in retiree benefits under State Health Plan—taking claim requires valid contract

In an action challenging amendments to the State Health Plan (SHP) that removed premium-free options for retired state employees, the State's action did not constitute an impermissible taking of private property where plaintiffs failed to show that the SHP statutes created a contractual obligation between the State and its employees.

Appeal by defendants from order entered 19 May 2017 by Judge Edwin G. Wilson, Jr. in Gaston County Superior Court. Heard in the Court of Appeals 29 November 2018.

Gray, Layton, Kersh, Solomon, Furr & Smith, P.A., by Michael L. Carpenter, Christopher M. Welchel, Marcus R. Carpenter, and Marshall P. Walker; Tin, Fulton, Walker & Owen, PLLC, by Sam McGee; and The Law Office of James Scott Farrin, by Gary W. Jackson, for plaintiff-appellees.

Attorney General Joshua H. Stein, by Solicitor General Matthew W. Sawchak, Deputy Solicitor General Ryan Y. Park, Special Deputy Attorney General Marc Bernstein, Special Deputy Attorney General Joseph A. Newsome, and Assistant Solicitor General Kenzie M. Rakes, for defendant-appellants.

TYSON, Judge.

Defendants appeal from an order granting Plaintiffs' motion for partial summary judgment and entry of judgment for liability and permanent injunction in favor of Plaintiffs. The judgment: (1) ordered Defendants to provide premium-free 80/20 "Enhanced" or Base Medicare Advantage Plan health benefits for the remainder of Plaintiffs' retirements; (2) enjoined Defendants from charging Plaintiffs for health insurance premiums; (3) required Defendants to determine monetary damages to reimburse Plaintiffs who had paid premiums since 1 September 2011, and to deposit the money into a common fund; (4) entered a declaratory judgment finding retirement health benefits are contractual and a part of Plaintiff's deferred compensation; and, (5) concluded Defendants had breached this contract with Plaintiffs. We reverse and remand.

I. Background

The General Assembly extended health care insurance benefits ("State Health Plan") to retired state employees and their dependents in 1974 under an indemnity plan. Act of April 11, 1974, ch. 1278, sec. 1, 1973 N.C. Sess. Laws 454. The State Health Plan previously had been provided only to active state employees. Act of July 20, 1971, ch. 1009, sec. 1, 1971 N.C. Sess. Laws 1588. From the outset of coverage, retirees were required to pay "the established applicable premium for the plan[.]" Act of April 11, 1974, ch. 1278, sec. 1, 1973 N.C. Sess. Laws 454. In 1981, the General Assembly amended the statutes related to the State Health Plan and provided for active employees and retirees to receive health insurance benefits "on a noncontributory basis." Act of June 23, 1982, ch. 1398, sec. 6, 1981 N.C. Sess. Laws 276, 295. Over the next thirty years, the State Health Plan's levels of benefits and coverage, deductibles, co-insurance rates, and out-of-pocket maximums were amended, and fluctuated, but retirees' benefits were provided without contribution from them.

In 2005, the General Assembly authorized the State Health Plan to introduce preferred provider organization ("PPO") plans for all active and retired State employees. Act of August 11, 2005, ch. 276, sec. 29.33(a), 2005 N.C. Sess. Laws 688, 1003-04. In 2006, the State Health Plan offered participants a choice of three PPO plans, with varying rates of co-insurance. Active and retired employees could choose the 70/30 PPO plan, the 80/20 PPO plan, or the 90/10 PPO plan. The 70/30 PPO and the 80/20 PPO were non-contributory. The contributory premium 90/10 PPO plan was discontinued in 2009.

In 2011, the General Assembly again amended the State Health Plan to require active employees and retirees to contribute a premium to receive benefits under the 80/20 PPO plan. Act of May 11, 2011, ch. 85, sec. 1.2(a), 2011 N.C. Sess. Laws 119, 120. The 70/30 PPO plan was, and still remains, premium-free for retirees, but not for active employees. *Id.*

In 2014, the State began to offer a premium-free Medicare Advantage plan, to age-eligible members, and a Consumer-Directed Health Plan ("CDHP"). Three "Wellness Activities" were also introduced, completion of which would reduce the premium for the CDHP, and would make that plan premium-free upon the completion of all three. The "Wellness Activities" required selecting a primary care physician, completing a health assessment questionnaire, and attesting to not using tobacco products or being enrolled in a tobacco-cessation program. These "Wellness Activities" can also significantly reduce premiums under the 80/20 PPO plan. Over 75% of state retirees are eligible to enroll in the

Medicare Advantage plan. Over 90% of retirees enrolled in either the CDHP or the 80/20 PPO plan completed all three "Wellness Activities."

Plaintiffs filed a complaint against the State and related governmental Defendants in 2012, challenging the 2011 amendments and asserting the State and Plaintiffs had entered into a non-amendable contract, which entitled Plaintiffs to premium-free, non-contributory static health benefits under an 80/20 health care plan for the remainder of their lives. Plaintiffs' causes of action assert claims for: (1) breach of contract, for removing the non-contributory 80/20 PPO plan and eliminating the optional 90/10 PPO plan; (2) impairment of contract under the Constitution of the United States and North Carolina Constitution; and, (3) deprivation of property without due process and equal protection under the North Carolina Constitution.

Defendants moved to dismiss the lawsuit in June 2012, under the theories of: (1) lack of jurisdiction over Defendants; (2) lack of subject matter jurisdiction due to the State's claim of sovereign immunity; (3) Plaintiffs' failure to exhaust all administrative remedies; and, (4) Plaintiffs' failure to state a claim upon which relief may be granted.

The trial court denied Defendants' motion to dismiss in May 2013. This Court affirmed the trial court's order, denying Defendants' motion to dismiss based upon sovereign immunity, and dismissed Defendants' appeal regarding the other issues. *Lake v. State Health Plan for Teachers & State Emples.*, 234 N.C. App. 368, 375, 760 S.E.2d 268, 274 (2014).

Defendants filed a motion for partial summary judgment on the issue of liability in September 2016. Plaintiffs also filed a motion for partial summary judgment in September 2016 to resolve all issues except the issue of damages for excess out-of-pocket expenses. After a hearing, the trial court granted Plaintiffs' motion for partial summary judgment and denied Defendants' motion in an order filed 19 May 2017. Defendants timely appealed.

II. Jurisdiction

[1] Defendants' appeal is from a grant of partial summary judgment. "A grant of partial summary judgment, because it does not completely dispose of the case, is an interlocutory order from which there is ordinarily no right of appeal." *Liggett Grp., Inc. v. Sunas*, 113 N.C. App. 19, 23, 437 S.E.2d 674, 677 (1993).

A party may appeal an interlocutory order if either: (1) the trial court makes a final determination regarding at least one claim and certifies there is no just reason to delay under N.C. Gen. Stat. § 1A-1, Rule 54(b);

or, (2) if delaying the appeal would affect a substantial right. *Id.* at 23-24, 437 S.E.2d at 677. The record does not include the trial court's Rule 54(b) certification. The only basis upon which Defendants' interlocutory appeal may proceed is to demonstrate a substantial right is impacted.

"A substantial right is a legal right affecting or involving a matter of substance as distinguished from matters of form: a right materially affecting those interests which [one] is entitled to have preserved and protected by law: a material right." *Gilbert v. N.C. State Bar*, 363 N.C. 70, 75, 678 S.E.2d 602, 605 (2009) (citation and internal quotation marks omitted). In order for a party to appeal from an interlocutory order based upon a substantial right, it must show the right is substantial and "the deprivation of that substantial right must potentially work injury . . . if not corrected before appeal from final judgment." *Goldston v. Am. Motors Corp.*, 326 N.C. 723, 726, 392 S.E.2d 735, 736 (1990). Defendants assert the trial court's ruling affects a substantial right in two ways: (1) the decision prevents the State from enforcing its statutes; and, (2) the decision imposes significant economic impacts upon the state budget.

The trial court granted a permanent injunction to enforce its order. The order requires Defendants to provide to Plaintiffs either the 80/20 PPO plan as it was offered in 2011, or the Base Medicare Advantage Plan, as it was offered in 2014, or their equivalents, for the remainder of their retirements. Defendants were enjoined from collecting any premiums from Plaintiffs for those plans. This order prevents the State from enforcing the 2011 statutory amendments on premium rates for contributory coverage. *See* Act of May 11, 2011, ch. 85, sec. 1.2(a), 2011 N.C. Sess. Laws 119, 120.

The Supreme Court of North Carolina has held a defendant's right to carry out its statutory duties is substantial. *Gilbert*, 363 N.C. at 77, 678 S.E.2d at 606. When a public entity is prevented from carrying out its statutory duties, the "continuance of the injunction in effect and the denial of the motion to dismiss . . . do adversely affect important rights" of that entity. *Freeland v. Greene*, 33 N.C. App. 537, 540, 235 S.E.2d 852, 854 (1977). Further, the protection of the financial stability of the state budget is also a substantial right, which carries the potential injury of a budget crisis. *Dunn v. State*, 179 N.C. App. 753, 757, 635 S.E.2d 604, 606 (2006).

Because Defendants are enjoined from enforcing duly-enacted statutory provisions requiring state retirees to pay premiums for certain levels of health coverage, and the cost of this premium-free health insurance at those higher levels could severely impact the state budget, we allow this interlocutory appeal pursuant to N.C. Gen. Stat. § 7A-27(b)(3)(a) (2017).

III. Standard of Review

"When the party bringing the cause of action moves for summary judgment, he must establish that all of the facts on all of the essential elements of his claim are in his favor[.]" *Steel Creek Dev. Corp. v. James*, 300 N.C. 631, 637, 268 S.E.2d 205, 209 (1980). This rule requires the movant to "show that there are no genuine issues of fact; that there are no gaps in his proof; that no inferences inconsistent with his recovery arise from his evidence; and that there is no standard that must be applied to the facts by the jury." *Kidd v. Early*, 289 N.C. 343, 370, 222 S.E.2d 392, 410 (1976).

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56.

We review a grant of summary judgment *de novo*. *Charlotte-Mecklenburg Hosp. Auth. v. Talford*, 366 N.C. 43, 47, 727 S.E.2d 866, 869 (2012).

IV. Impairment of Contract

[2] North Carolina appellate courts "presume[] that statutes passed by the General Assembly are constitutional, and duly passed acts will not be struck unless found [to be] unconstitutional beyond a reasonable doubt." *N.C. Ass'n of Educators v. State*, 368 N.C. 777, 786, 786 S.E.2d 255, 262 (2016) [hereinafter *NCAE*] (citations omitted). Plaintiffs argued, and the trial court found, the 2011 amendment to the General Statutes requiring active state employees and retirees to contribute a premium for the 80/20 PPO plan substantially impaired a contract made between the State and Plaintiffs, and as such, violated the Constitution of the United States.

The "Contract Clause" in the Constitution of the United States provides, in relevant part: "No State shall . . . pass any . . . Law impairing the Obligation of Contracts[.]" U.S. Const. art. I, § 10. A three-part test to determine whether a contractual right has been impaired was set forth by the Supreme Court of the United States in *U.S. Trust Co. of N.Y. v. New Jersey*, 431 U.S. 1, 52 L. Ed. 2d 92 (1977).

North Carolina adopted this test in *Bailey v. State*, 348 N.C. 130, 500 S.E.2d 54 (1998), when our Supreme Court acknowledged "[t]he *U.S. Trust* test requires a court to ascertain: (1) whether a contractual obligation is present, (2) whether the state's actions impaired that contract,

and (3) whether the impairment was reasonable and necessary to serve an important public purpose." *Id.* at 141, 500 S.E.2d at 60.

Defendants argue Plaintiffs cannot prevail on their Contract Clause claim and contend the trial court erred by granting Plaintiffs' motion for summary judgment on that basis. We agree.

A. No Statutory Contractual Obligation Exists

Plaintiffs assert health insurance is an employment benefit, which arose in the course of state employment, and constitutes a part of the compensation contract between the State and state employees. Furthermore, because the employees did not have to pay any premiums for health insurance during their service, after vesting for retirement benefits, Plaintiffs assert they also acquired a lifetime guarantee of premium-free health insurance in retirement. They contend when the State required premium payments, it impaired their employment contract or took their vested property rights to premium-free, 80/20 level health care. They further argue our courts have employed a unilateral contract analysis, not only in "retirement benefits," but also to "employment benefits," such as tenure, special separation allowances, severance pay, and vacation pay. *NCAE*, 368 N.C. 777, 786 S.E.2d 255 (applying the analysis to tenure); *Wiggs v. Edgecombe Cty.*, 361 N.C. 318, 643 S.E.2d 904 (2007) (applying the analysis to special separation allowances); *Bolick v. Cty. of Caldwell*, 182 N.C. App. 95, 641 S.E.2d 386 (2007) (applying the analysis to severance pay); *Pritchard v. Elizabeth City*, 81 N.C. App 543, 344 S.E.2d 821 (1986) (applying the analysis to vacation pay).

The Supreme Courts of the United States and of North Carolina have both "recognized a presumption that a state statute 'is not intended to create private contractual or vested rights but merely declares a policy to be pursued until the legislature shall ordain otherwise.' " *NCAE*, 368 N.C. at 786, 786 S.E.2d at 262 (citing *Dodge v. Bd. of Educ.*, 302 U.S. 74, 79, 82 L. Ed. 57, 62 (1937)).

"Policies, unlike contracts, are inherently subject to revision and repeal, and to construe laws as contracts when the obligation is not clearly and unequivocally expressed would be to limit drastically the essential powers of a legislative body." *Nat'l R.R. Passenger Corp. v. Atchison, T. & S. F. R. Co.*, 470 U.S. 451, 466, 84 L. Ed. 2d 432, 446 (1985).

Our Supreme Court has held: "Construing a statute to create contractual rights in the absence of an expression of unequivocal intent would be at best ill-advised, binding the hands of future sessions of the legislature and obstructing or preventing subsequent revisions and

repeals." *NCAE*, 368 N.C. at 786, 786 S.E.2d at 262-63. The party asserting the creation of an express or implied and unamenable contract bears the burden of overcoming this presumption. *Id.* at 786, 786 S.E.2d 255, 262; *Nat'l R.R.*, 470 U.S. at 466, 84 L. Ed. 2d at 446.

1. Health Care Benefits Are Not Analogous to Pension Benefits

Plaintiffs contend this unilateral contract, requiring the provision of non-contributory and prescribed levels of health care insurance benefits, was formed once Plaintiffs had worked for the number of years required for them to vest into the State's retirement system. Plaintiffs cite to case law pertaining to and interpreting pension and disability retirement benefits to support their argument. In *Bailey v. State*, the plaintiffs challenged an amendment to the General Statutes, which had removed the exemption from state taxation on retirement benefits paid by the State. 348 N.C. at 139, 500 S.E.2d at 59.

The Supreme Court in *Bailey* relied upon previous cases where a contractual relationship was found based on "the principle that where a party in entering an obligation relies on the State, he or she obtains vested rights that cannot be diminished by subsequent state action." *Id.* at 144, 500 S.E.2d at 62. Previous case law had concluded pension benefits were a vested contractual right because they were a form of "deferred compensation." *Id.* at 141, 500 S.E.2d at 60. The Court held because the "relationship between the Retirement Systems and employees vested in the system is contractual in nature, the right to benefits exempt from state taxation is a term of such contract." *Id.* at 150, 500 S.E.2d at 66.

Our Supreme Court applied the same reasoning to disability pension benefits in *Faulkenbury v. Teachers' & State Emples. Ret. Sys.*, 345 N.C. 683, 483 S.E.2d 422 (1997). "At the time the plaintiffs' rights to pensions became vested, the law provided that they would have disability retirement benefits calculated in a certain way." *Id.* at 690, 483 S.E.2d at 427. The Supreme Court distinguished the vesting of both pension and disability benefits as benefits that had been presently earned and vested through performance, and not "based upon future actions by the plaintiffs." *NCAE*, 368 N.C. at 788, 786 S.E.2d at 264.

Plaintiffs argued, and the trial court found, that non-contributory retirement health care insurance benefits were part of the overall compensation package and the provision of such created a contract between the State and Plaintiffs. Defendants assert the State Health Plan statute does not create a contractual relationship between the State and Plaintiffs. Whether or not non-contributory health care insurance

benefits are vested rights, which create a contract between the State and state employees, is an issue of first impression for this Court. After review of the governing statutes and how other jurisdictions have defined health care benefits, we decline to extend contractual rights based upon a notion of deferred compensation to require Defendants to provide static and non-contributory health care insurance benefits under the State Health Plan.

Pension benefit costs are shared contributions and expenses between an employee and the State. A mandatory six percent (6%) of salary is deducted from the employee's paycheck to be deposited towards payment of future pension benefits. N.C. Gen. Stat. § 135-8(b)(1) (2017). The employee's future pension benefit is calculated based upon the employee's salary and length of service. *See* N.C. Gen. Stat. § 135-5 (2017). These future, deferred compensation payments are protected from abolition, liquidation, or diminution by law. N.C. Gen. Stat. § 135-12 (2017); *Bailey*, 348 N.C. at 144, 500 S.E.2d at 62. Employees have a "nonforfeitable" right to the return of their contributions to the retirement system. N.C. Gen. Stat. § 135-18.6 (2017).

Conversely, non-contributory health care insurance benefits are not mandatory. Employees become "eligible" for health care benefits upon employment and may use payroll deduction to pay for the benefits, but are not required to do so. N.C. Gen. Stat. §§ 135-48.1(15), 135-48.2(b) (2017). Unlike pensions, the level of retirement health care benefits is not dependent upon an employee's position, retirement plan, salary, or length of service. All eligible participants, active and retired, have equal access to the same choices in health care plans. The State endeavors to "make available a State Health Plan," but amendments thereto are not prohibited. N.C. Gen. Stat. § 135-48.2(a) (2017); *see also* N.C. Gen. Stat. § 135-48.3 (2017).

2. Sister States' Experiences

i. Michigan

Other jurisdictions have found health care insurance benefits were not vested benefits, unlike pensions, based upon some of the distinctions above. The Supreme Court of Michigan declined to afford vested pension protection to health care benefits under their state's constitution, in part, due to differences in how the benefits were earned and calculated. *Studier v. Mich. Pub. Sch. Emples. Ret. Bd.*, 698 N.W.2d 350 (Mich. 2005). In distinguishing pension benefits and health care insurance benefits, the court noted pension benefits increase in relation to how many years of service a state employee has completed and their

salary, whereas neither the amount of health care benefits an employee received nor the premiums paid are tied to an employee's salary or the accrued number of years of service. *Id.* at 358.

ii. Tennessee

The Supreme Court of Tennessee also distinguished between the health insurance plan offered to state employees, which it classified as a "welfare benefit," and the retirement pension plan provided to state employees. *Davis v. Wilson Cty.*, 70 S.W.3d 724, 727 (Tenn. 2002). County governments were authorized to provide health insurance coverage, but there was no legal requirement to provide a "welfare benefit" plan. *Id.* The court relied upon previous case law, distinguishing between automatically vesting pension benefits and health care benefits, noting as to the latter, "no contractual rights exist 'simply by reason of employment.' " *Id.* at 728 (quoting *Blackwell v. Quarterly Cty. Court of Shelby Cty.*, 622 S.W.2d 535, 540 (Tenn. 1981)).

iii. Alaska, Hawaii, and Illinois

The Plaintiffs cite cases from other jurisdictions to support a conclusion that the State Health Plan is part of the overall retirement package, and thus subject to vesting. All three cases Plaintiffs cite, *Kanerva v. Weems*, 13 N.E.3d 1228 (Ill. 2014), *Everson v. State*, 228 P.3d 282 (Haw. 2010), and *Duncan v. Retired Pub. Emples. of Alaska, Inc.*, 71 P.3d 882 (Alaska 2003), involve interpretation of provisions that are contained in those states' respective constitutions.

Each state's constitution includes specific language asserting the contractual nature of the states' retirement programs. *See* Illinois Const., Art. XIII, § 5 ("Membership in any pension or retirement system of the State, any unit of local government or school district, or any agency or instrumentality thereof, *shall be* an enforceable contractual relationship, the benefits of which shall not be diminished or impaired.") (emphasis supplied); HRS Const. Art. XVI, § 2 ("Membership in any employees' retirement system of the State or any political subdivision thereof *shall be* a contractual relationship, the accrued benefits of which shall not be diminished or impaired.") (emphasis supplied); Alaska Const. Art. XII, § 7 ("Membership in employee retirement systems of the State or its political subdivisions *shall constitute* a contractual relationship. Accrued benefits of these systems shall not be diminished or impaired.") (emphasis supplied).

These cases are inapplicable to the issue of the relationship between retirement pensions and health care benefits in North Carolina. First,

North Carolina's Constitution does not contain a specific provision mandating a contractual relationship exists between the State and its employees as participants in the state retirement systems.

Second, each of the states in the cases cited by Plaintiffs have statutes mandating the provision of health care benefit plans to state employees. *See* 5 Ill. Comp. Stat. Ann. 375/10 (2005 & Supp. 2012) ("The State *shall* pay the cost of basic non-contributory group life insurance and . . . the basic program of group health benefits on each eligible member") (emphasis supplied); Haw. Rev. Stat. Ann. § 87A-15 (Supp. 2009) ("The board *shall* administer and carry out the purpose of the fund. Health and other benefit plans *shall* be provided at a cost affordable to both the public employers and the public employees.") (emphasis supplied); Alaska Stat. Ann. § 39.30.095(a) (2010) ("The commissioner of administration *shall* establish the group health and life benefits fund as a special account in the general fund to provide for group life and health insurance") (emphasis supplied).

As stated above, the provision of static, non-contributory health insurance benefits are not mandated by North Carolina's Constitution or in the General Statutes. N.C. Gen. Stat. § 135-48.2(a). Plaintiffs' reliance on these other states' cases as persuasive support is misplaced.

The General Assembly has clearly distinguished between the mandatory retirement benefits and the optional health care insurance benefits the statutes have historically provided. The retirement system was enacted and created in 1941. Act of February 17, 1941, ch. 20, sec. 2, 1941 N.C. Sess. Laws 20, 23. Health care benefits were not provided to any state employees until thirty years later, in 1971, and were only authorized for active employees of the State. Act of July 20, 1971, ch. 1009, sec. 1, 1971 N.C. Sess. Laws 1588. As previously mentioned, health care coverage was extended to qualified retirees in 1974, and these retirees were required to pay for premiums and contribute to the costs. Act of April 11, 1974, ch. 1278, sec. 1, 1973 N.C. Sess. Laws 454. Non-contributory retirement health care benefits only began in 1981. Act of June 23, 1982, ch. 1398, sec. 6, N.C. Sess. Laws 276, 295. Every other substantive change to the State Health Plan occurred after 1981.

The trial court's purported decision, and Plaintiffs' attempt on appeal, to conflate and equate the retirement plan and the health care plan, because both are included in Chapter 135 of the General Statutes, is error. No congruent relationship between the retirement benefits and the health care benefits exists to allow the trial court or this Court to construe and conclude an express and unalterable contractual relationship

exists, on any basis, for the State to provide static and non-contributory heath care insurance benefits to retirees.

3. Statutory Language Does Not Expressly Provide for Vesting

Plaintiffs assert the lack of express contractual language in the statute or North Carolina's Constitution is not determinative. Defendants cite to the lack of contractual language in the State Health Plan, which further supports a finding and conclusion that no contract exists. *NCAE*, 368 N.C. at 787, 786 S.E.2d at 263. We find Defendants' argument persuasive.

Plaintiffs rely upon cases that look to additional evidence, such as pamphlets, handbooks, and oral representations, to support a finding of a contractual relationship. In *Stone v. State*, 191 N.C. App. 402, 664 S.E.2d 32 (2008), this Court looked to pamphlets, distributed by the State to its employees to explain the retirement benefits, to support its holding that State employees have a contractual right to have the retirement system funded in an "actuarially sound manner." *Id.* at 414-15, 664 S.E.2d at 40.

This Court found the statements in those pamphlets, including references to "actuarial calculations" and the retirement system being maintained as "actuarially sound," became a term or condition of the retirement contracts. *Id.* at 414, 664 S.E.2d at 40. We have already distinguished the differences between the mandatory and contributory retirement benefits and the State's policy to offer optional health care benefits. *Stone* has no application to the case at bar.

The other cases Plaintiffs cite for support, *Bailey*, 348 N.C. at 146, 500 S.E.2d at 63; *Bolick*, 182 N.C. App. at 100-01, 641 S.E.2d at 390; and *Pritchard*, 81 N.C. App. at 552-53, 344 S.E.2d at 826-27, fail to support their arguments for similar reasons.

Our Supreme Court, following precedent from the Supreme Court of the United States, has found whether or not a statute contains the word "contract" is critical to find legislative intent to create such a relationship. *NCAE*, 368 N.C. at 787, 786 S.E.2d at 263. The statutes governing the State Health Plan do not refer to a "contract" between the employees and the State. The term "contract" *is* used in the statute to describe the relationship between the State Health Plan and its service providers. *E.g.*, N.C. Gen. Stat. § 135-48.1(3) (2017) ("Claims Processor. -- One or more administrators, third-party administrators, or other parties *contracting* with the Plan to administer Plan benefits") (emphasis supplied); N.C. Gen. Stat. § 135-48.10(b) (2017) ("The terms of a *contract* between the Plan and its third party administrator or between the Plan

and its pharmacy benefit manager are public record") (emphasis supplied); N.C. Gen. Stat. § 135-48.12(f) (2017) ("The Committee shall designate either the actuary under *contract* with the Department of State Treasurer, Retirement Systems Division, or the actuary under *contract* with the State Health Plan for Teachers and State Employees as the technical adviser") (emphasis supplied); N.C. Gen. Stat. § 135-48.33(b) (2017) ("The Plan shall: (i) submit all proposed *contracts* for supplies, materials, printing, equipment, and contractual services . . . for review") (emphasis supplied).

The use of contractual language in the statute in reference to service providers indicates the General Assembly specified situations and knew when to use the word "contract," and it did not intend to form a contractual relationship between the State and its employees related to health care insurance benefits. *See NCAE*, 368 N.C. at 787, 786 S.E.2d at 263. The use of contractual language elsewhere in the statute merely indicates the provisions and benefits in the statute is "an articulated policy that, like all policies, is subject to revision or repeal[,]" as the General Assembly has enacted on many prior occasions. *See Nat'l R.R.*, 470 U.S. at 467, 84 L. Ed. 2d at 447.

In fact, the statute contains and reserves an express right to amend provision, which empowers the General Assembly "the right to alter, amend, or repeal" the State Health Plan. N.C. Gen. Stat. § 135-48.3. This express reservation by the General Assembly "is hardly the language of contract." *Nat'l R.R.*, 470 U.S. at 467, 84 L. Ed. 2d at 447. To construe this clear language of the statute to create a contractual relationship "would be at best ill-advised, binding the hands of future sessions of the legislature and obstructing or preventing subsequent revisions and repeals" and would remove the flexibility required to meet changing conditions, benefits, and future advances in rendering and receiving medical and health-related services. *NCAE*, 368 N.C. at 786, 786 S.E.2d at 262-63.

The State Health Plan has undergone multiple and extensive revisions since its initial enactment in 1971. *See* Act of July 20, 1971, ch. 1009, sec. 1, 1971 N.C. Sess. Laws 1588. The General Assembly reserved this power "to alter, amend, or repeal" in the same legislation that provided premium-free health care benefits to retirees. Act of June 23, 1982, ch. 1398, sec. 1, 1983 N.C. Sess. Laws 276, 311. The General Assembly has exercised this reserved power to revise and amend approximately 200 times without challenge since 1983. As part of the record, Defendants included a nine-page document cataloguing these revisions. Some of these changes were minor, and often "clarified" some aspect of the legislation. *See, e.g.*, Act of July 15, 1986, ch. 1020, sec. 24, 26, 1985 N.C. Sess.

Laws 594, 597 (clarifying covered services must be "medically necessary," not just "necessary").

Some changes added benefits. Coverage was often added for various ailments and procedures. *See*, *e.g.*, Act of July 6, 1984, ch. 1110, sec. 11, 1984 N.C. Sess. Laws 300, 305-06 (adding coverage for chemical dependency); Act of June 27, 1991, ch. 427, sec. 41, 1991 N.C. Sess. Laws 833, 850 (providing coverage for lung, heart-lung, and pancreas transplants); Act of July 28, 1995, ch. 507, sec. 7.26, 1995 N.C. Sess. Laws 1525, 1574 (adding coverage for oral surgery necessitated because of medical treatment).

Many other amendments arguably reduced the type and level of benefits. Many of these changes increased the amount of co-insurance and co-pays that beneficiaries were required to cover. *See*, *e.g.*, Act of May 16, 1985, ch. 192, sec. 1-4, 1985 N.C. Sess. Laws 157 (reducing co-insurance rate from 95% to 90%); Act of June 27, 1991, ch. 427, sec. 19, 33, 1991 N.C. Sess. Laws 833, 843, 848 (reducing co-insurance rates from 90% to 80%). Other changes raised the deductible or increased the out-of-pocket maximums. *See*, *e.g.*, Act of June 28, 2001, ch. 253, sec. 1.(b), 1.(c), 1.(f), 1.(m), 2001 N.C. Sess. Laws 663-64, 666, 670-71; Act of August 11, 2005, ch. 276, sec. 29.31(b), (d), 2005 N.C. Sess. Laws 1001, 1002-03.

This "oft-amended course" of statutory amendments is further evidence of the lack of intent by the State to create an unalterable static contract. *NCAE*, 368 N.C. at 788, 786 S.E.2d at 264. Such extensive revisions support a holding that the establishment and maintenance of the North Carolina State Health Plan is a legislative policy, which is expressly and "inherently subject to revision and repeal" by the General Assembly. *Nat'l R.R.*, 470 U.S. at 466, 84 L. Ed. 2d at 446.

Plaintiffs ignore the more than 200 unchallenged amendments and revisions, and contend the right to amend provision in the statute is inapplicable to cases that involve vested rights and deferred compensation. Based upon our conclusion and holding that the State Health Plan is not a vested right nor a contract for deferred compensation like the pension, this argument is without merit. Plaintiffs' argument that the State Health Plan must be allowed to change as health care evolves, but cannot reduce the "value" of what has been vested is specious, and also fails.

In addition to the State Health Plan not being a vested right, the General Assembly has often amended, altered, and reduced the "value" of the benefit offered by increasing co-insurance rates, co-pays, and out-of-pocket maximums or excluding coverage. Plaintiffs erroneously

contend Defendants' arguments pertaining to the statutory right to amend provision are "tired," and have been struck down by both the trial court and this Court. When the matter was previously before this Court, the sole issue decided concerned the applicability of sovereign immunity. *Lake*, 234 N.C. App. at 375, 760 S.E.2d at 274. This Court did not reach either Plaintiffs' or Defendants' arguments on the merits. *Id.*

The trial court erred in holding a contractual relationship existed between the State and its employees in regards to the provision of unalterable and static non-contributory health insurance benefits to Plaintiffs.

B. No Impairment of Contract

To succeed on an impairments claim under the Contract Clause, asserting the State impermissibly impaired a contract, Plaintiffs must first show the existence of a valid contract. *Bailey*, 348 N.C. at 141, 500 S.E.2d at 60. Only upon a showing of a contractual obligation can the courts proceed to the second and third parts of the analysis: whether the State, in fact, impaired the contract and, if so, whether the impairment was reasonable. *Id.*

Plaintiffs failed to carry their burden to prove the existence of a valid contract, and consequently the existence of any valid claim fails. *See NCAE*, 368 N.C. at 786, 786 S.E.2d at 262-63. The trial court erred by granting partial summary judgment in favor of Plaintiffs.

V. No "Taking" Under State Constitution

[3] At summary judgment, Plaintiffs asserted claims under the "Law of the Land" clause of the North Carolina Constitution. This clause provides, in relevant part: "[n]o person shall be . . . in any manner deprived of his . . . property, but by the law of the land." N.C. Const. art. I, § 19. A contractual right is a property right, and the impairment of a valid contract is an impermissible taking of property. *Bailey*, 348 N.C. at 155, 500 S.E.2d at 69.

The trial court erroneously concluded a contractual relationship existed, and as a result, also concluded Defendants had violated Article I, section 19 of the Constitution and taken Plaintiffs' private property without just compensation. "For an unconstitutional taking to occur, Plaintiffs must have a recognized property interest for the State to take." *Adams v. State*, __ N.C. App. __, __, 790 S.E.2d 339, 344 (2016). Without a valid contract, Plaintiffs' state constitutional claims also fail. *Id.* The trial court erred in granting partial summary judgment on Plaintiffs' state takings claims. Neither party argues any violations of other state constitutional provisions.

VI. Conclusion

Plaintiffs failed to establish the essential elements of their asserted contract, as is required to support an impairments claim in their favor. *See Steel Creek Dev. Corp.*, 300 N.C. at 637, 268 S.E.2d at 209. The vested, contractual rights state employees enjoy under the state retirement plan do not transfer to and are not congruent with the provision of mandatory premium-free benefits under the State Health Plan.

The plain language of the statute prohibits a finding and conclusion of the General Assembly's intent to create an unalterable contractual relationship between the State and active or retired employees in regards to static provisions in the State Health Plan. In fact, the Constitution's and the statutes' omission of contractual language, the General Assembly's express statutory reservation of the right to amend clause, and the hundreds of unchallenged revisions and amendments to the statute in the past, refutes any contrary finding.

An objective reading of the State Health Plan statute, and the extensive statutory amendments since 1981, indicates retired state employees are promised nothing more than equal access to health care benefits on an equal basis with active state employees. Under the current statute revisions and policy regarding the State Health Plan, retirees still have access to at least one premium-free option, the 70/30 plan, and, if qualified, to the premium-free Medicare Advantage plan. Active state employees have no premium-free health care options.

The State endeavors to "make available a State Health Plan." N.C. Gen. Stat. § 135-48.2(a). Making available and providing access does not create any specific contractual financial obligation. *See id.* Without a showing of a valid contractual financial obligation, Plaintiffs claims under either the Contract Clause of the Constitution of the United States or the Law of the Land clause of the North Carolina Constitution fail. The trial court erred in granting partial summary judgment in favor of Plaintiffs.

We reverse the grant of partial summary judgment and remand for entry of summary judgment in favor of Defendants and dismissal of Plaintiffs' complaint. *It is so ordered.*

REVERSED AND REMANDED.

Judges BRYANT and HUNTER concur.

DONNA J. PRESTON, ADMINISTRATOR OF THE ESTATE OF WILLIAM M. PRESTON, PLAINTIFF
v.
ASSADOLLAH MOVAHED, M.D., DEEPAK JOSHI, M.D., AND PITT COUNTY MEMORIAL HOSPITAL, INCORPORATED, D/B/A, VIDANT MEDICAL CENTER, DEFENDANTS

No. COA18-674

Filed 5 March 2019

Medical Malpractice—Rule 9(j) certification—substantive noncompliance—at time of complaint

The trial court's dismissal of a medical malpractice action for substantive Rule 9(j) noncompliance was affirmed where competent evidence supported the trial court's findings, which in turn supported its conclusion that the Rule 9(j) certificate was factually unsupported at the time plaintiff filed her complaint. Plaintiff had no cardiologist willing to testify against defendant-cardiologist at the time she filed her complaint (the cardiologist identified in her Rule 9(j) certificate agreed to testify against defendant-cardiologist only if plaintiff retained a nuclear cardiologist)—and only consulted and retained such an expert months later and after expiration of the statute of limitations.

Appeal by Plaintiff from order entered 25 October 2017 by Judge Jeffery B. Foster in Pitt County Superior Court. Heard in the Court of Appeals 17 January 2019.

Edwards Kirby, LLP, by David F. Kirby, John R. Edwards, and Mary Kathryn Kurth; Laurie Armstrong Law, PLLC, by Laurie Armstrong; for Plaintiff-Appellant.

Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, L.L.P., by John D. Madden and Eva Gullick Frongello, for Defendant-Appellee.

COLLINS, Judge.

Plaintiff Donna Preston, decedent William M. Preston's widow and estate representative, appeals an order dismissing her wrongful death action alleging medical malpractice against Defendant Assadollah Movahed, M.D.[1] After a compliance hearing, the trial court concluded

1. The remaining Defendants have settled the claims against them and Plaintiff has voluntarily dismissed them from this appeal pursuant to N.C. R. App. P. 37(e)(2) (2018).

the facially valid Rule 9(j) pre-lawsuit medical expert review certification in Plaintiff's medical malpractice complaint was factually unsupported when it was filed, which was two days before the expiration of the applicable statute of limitations period. Therefore, the trial court granted Defendant's motion to dismiss the complaint for substantive Rule 9(j) noncompliance.

On appeal, Plaintiff contends the trial court erred by dismissing her complaint because the certificate substantively complied with Rule 9(j). We disagree. Because competent evidence supported the trial court's factual findings, which in turn supported its legal conclusions and ultimate decision that the Rule 9(j) certificate was factually unsupported at the time Plaintiff had filed her complaint and before the statute of limitations period had expired, we affirm the trial court's order dismissing her complaint for substantive Rule 9(j) noncompliance.

I. Procedural History and Factual Background

Plaintiff's complaint and later medical expert deposition testimony reveals the following facts: Around 8:30 a.m. on 3 February 2014, William M. Preston (Preston) presented to Vidant Medical Center's emergency department complaining of chest pain and shortness of breath. Preston's emergency room electrocardiogram (EKG) test revealed abnormalities consistent with myocardial ischemia, a condition where not enough blood reaches the heart. That evening, Preston was admitted to the hospital's observation unit under the care of attending physician Pranitha Prodduturvar, M.D. After Dr. Prodduturvar examined Preston, she ordered a cardiac workup including, *inter alia*, a nuclear stress test (NST).

Around noon the next day, hospital providers administered Preston's NST. An NST involves injecting a patient with radioactive material and subjecting him to cardiovascular exercise in order to obtain nuclear images of the heart revealing blood flow while under stress and at rest. Dr. Movahed, the hospital's attending nuclear cardiologist, who was neither acting as a formal cardiology consult nor had personally examined Preston, was assigned to interpret Preston's NST results. Interpreting the results of an NST involves assessing the treadmill stress test and EKG tracings taken of the heart, in conjunction with analyzing the nuclear cardiology images.

Following the test, Dr. Movahed orally reported his interpretation of Preston's NST to cardiology fellow Deepak Joshi, M.D., with instructions for Dr. Joshi to communicate his findings to Preston's then-attending physician, Neha Doctor, M.D. In Dr. Movahed's later-dictated report, he noted "a perfusion defect in [Preston's] heart . . . might be due to significant gas

in the stomach, but . . . he could not rule out ischemia as a possible cause of the abnormality." Dr. Movahed also suggested, based upon Preston's abnormal NST, "[o]ne may consider a [coronary computed tomography angiogram, also known as a] CTA," which is an additional cardiac test to evaluate suspected coronary artery disease.

Subsequently, on 4 February 2014, attending physician Dr. Doctor personally examined Preston and ordered his discharge from the hospital. Preston was instructed to follow up with his primary care physician about ordering an MRI to assess potential neurological causes for his symptoms and was scheduled for an outpatient cardiology follow-up on 20 February 2014.

On 6 February 2014, Preston was examined by his primary care physician, who ordered the MRI. On 10 February 2014, Preston returned to his primary care physician to discuss the MRI results, which revealed no neurological explanation for Preston's symptoms. On 13 February 2014, six days before his scheduled outpatient cardiology follow-up, Preston suffered a fatal heart attack in his home.

On 25 November 2015, Plaintiff filed a wrongful death medical malpractice complaint against Dr. Prodduturvar and Dr. Doctor, and four medical entities associated with Vidant Medical Center (first complaint). Plaintiff alleged the physicians were medically negligent in their care of Preston during his admission to the hospital and their failure to order further immediate testing and medical treatment before he was discharged from the hospital. Neither Dr. Movahed nor Dr. Joshi were named in the first complaint.

On 12 February 2016, two days before the applicable statute of limitations period expired, Plaintiff filed a second wrongful death medical malpractice complaint, this time naming Dr. Movahed and Dr. Joshi, and their employer, Pitt County Memorial Hospital, Incorporated, d/b/a Vidant Medical Center (second complaint). The second complaint asserted Dr. Movahed was negligent in that he

> a. Failed to accurately interpret and communicate the findings and significance of diagnostic tests performed on Mr. Preston;
>
> b. [F]ailed to adequately, appropriately and timely suggest and perform a full assessment and work-up to rule out life-threatening acute coronary artery disease for a patient at high risk for the disease, including, but not limited to, cardiac catheterization;

> c. [F]ailed to recommend a cardiology consult for Mr. Preston prior to his discharge from Vidant Medical Center with acute chest pain;
>
> d. [F]ailed to conduct an adequate assessment of Mr. Preston's risk factors for coronary artery syndrome;
>
> e. [F]ailed to prescribe any treatment to Mr. Preston for possibility of acute coronary artery disease before discharging him from the hospital; [and]
>
> f. [F]ailed to comply with standards of practice among physicians and cardiolovascular [sic] disease specialists with the same or similar training and experience in Pitt County, North Carolina, or similar communities in 2014[.]

The complaint also included the following Rule 9(j) certificate:

> the medical care of the defendant and all medical records pertaining to the alleged negligence of this defendant that are available to the plaintiff after reasonable inquiry have been reviewed before the filing of this complaint by a person who is reasonably expected to qualify as an expert witness under Rule 702 of the North Carolina Rules of Evidence and who is willing to testify that the medical care did not comply with the applicable standard of care.

On 25 April 2016, Defendant filed his answer to the second complaint, denying all allegations of negligence and breach of the standard of care, and moving to dismiss Plaintiff's action, *inter alia*, "[i]f discovery indicates that Plaintiff did not comply with the requirements of Rule 9(j)[.]"

On 9 August 2016, in response to Defendant's Rule 9(j) interrogatories, Plaintiff identified Stuart Toporoff, M.D., "a physician specializing in the area of cardiology," and Andy S. Pierce, M.D., "a physician specializing in the area of internal medicine and hospitalist care," as her Rule 9(j) pre-review medical experts. Attached to her response, Plaintiff included, *inter alia*, Dr. Toporoff's curriculum vitae and a Rule 9(j) pre-review medical expert affidavit signed by Dr. Toporoff.[2] In his affidavit, Dr. Toporoff stated he had "reviewed the medical records related to

2. Plaintiff attached Dr. Toporoff's 10 November 2015 affidavit, which was relevant to her first lawsuit against the hospitalists. She later supplied Defendant with Dr. Toporoff's 12 February 2016 affidavit, which was relevant to her second lawsuit and intended to be attached to her response. We discuss only Dr. Toporoff's second affidavit.

medical care provided to William Preston during his presentation with chest pain to Vidant Medical Center on February 3–4, 2014" and had "been provided a packet of information . . . about the training and experience of . . . [Dr.] Movahed" and "the Answer of Defendant Neha Doctor, MD" to the first complaint. Based upon his review of these materials, Dr. Toporoff opined that the "medical care provided to William Preston during his admission to Vidant Medical Center . . . for chest pain, failed to comply with the applicable standard of care for the evaluation of a patient with chest and arm pain who presented with Mr. Preston's signs, symptoms and medical history" and "expressed [his] willingness to testify to the above if called upon to do so."

On 15 December 2016, Plaintiff submitted an expert witness designation, identifying her Rule 9(j) experts Dr. Toporoff and Dr. Pierce, as well as nuclear cardiologists Mark I. Travin, M.D., and Salvador Borges-Neto, M.D.

On 23 March 2017, Defendant deposed Dr. Toporoff. During his deposition, Dr. Toporoff confirmed that Dr. Movahed's involvement in Preston's care was limited to interpreting his NST results. Dr. Toporoff also admitted that, as a non-nuclear cardiologist who never interpreted the results of an NST, he was incompetent to qualify as a nuclear cardiologist against Dr. Movahed or criticize his interpretation of the nuclear imaging component of Preston's NST. But, Dr. Toporoff testified that he felt qualified as a clinical cardiologist who interpreted EKG tracings when administering treadmill stress tests to patients and thus comfortable stating Dr. Movahed's interpretation of the EKG component of Preston's NST fell below the applicable standard of care. However, Dr. Toporoff further testified that, when initially consulted to review the case before Plaintiff filed her first lawsuit against the physicians, he told Plaintiff not to name Dr. Movahed because Dr. Toporoff refused to testify against him unless Plaintiff retained a nuclear cardiologist competent and willing to testify that Dr. Movahed's interpretation of the nuclear imaging component of Preston's NST fell below the applicable standard of care. As to what new information Dr. Toporoff reviewed in between the filings of the first and second lawsuit, he admitted that the only additional medical record was the nuclear images from Preston's NST, which he confirmed he was incompetent to interpret, and Dr. Doctor's pleading in response to the first lawsuit.

On 16 June 2017, Defendant filed a second motion to dismiss Plaintiff's second complaint under North Carolina Civil Procedure Rules 12(b)(6), 9(j), and 41. In response, Plaintiff submitted a third affidavit from Dr. Toporoff signed 15 September 2017. In his third affidavit, Dr.

Toporoff explained in greater detail the significance of Dr. Doctor's pleading in response to the first complaint, which Dr. Toporoff had reviewed prior to signing his second Rule 9(j) affidavit naming Dr. Movahed before Plaintiff filed the second complaint. Dr. Toporoff stated as follows:

> 7) Based on the representation by Dr. Doctor in those documents of the following information: that Dr. Movahed's report was NOT available to her prior to Mr. Preston's discharge; that Dr. Movahed had specifically made recommendations to the hospitalist; and that Dr. Joshi communicated the results of the nuclear stress test with "cardiology's" recommendation for an outpatient CT angiogram, I informed [Plaintiff] I was willing to testify that Dr. Movahed and Dr. Joshi violated standards of care in their collaboration and treatment of Mr. Preston.
>
> 8) My criticisms of Drs. Movahed and Joshi include: failures to interpret, diagnose, document and communicate to the ordering physician the presence of chest pain and ST wave depression changes during Mr. Preston's nuclear treadmill stress test that were consistent with ischemia; and failure to recommend an immediate cardiology consult for Mr. Preston prior to his discharge.

On 18 September 2017, the trial court held a Rule 9(j) compliance hearing on Defendant's motion to dismiss Plaintiff's complaint. On 25 October 2017, the trial court entered an order, concluding in relevant part that Dr. Movahed's deposition testimony established the facially valid Rule 9(j) certificate in Plaintiff's second complaint was factually unsupported when filed, and that Plaintiff had failed to comply with Rule 9(j)'s substantive requirements before the applicable statute of limitations period had expired. Accordingly, the trial court granted Defendant's motion to dismiss Plaintiff's complaint for substantive Rule 9(j) noncompliance. Plaintiff appeals.

II. Discussion

On appeal, Plaintiff contends the trial court erred by granting Defendant's motion to dismiss her action for noncompliance with Rule 9(j) because (1) her complaint satisfied the purpose and substantive requirements underlying Rule 9(j); (2) the trial court erred by determining it was unreasonable for Plaintiff to expect Dr. Toporoff to qualify as an expert witness against Dr. Movahed; and (3) three of the trial court's twenty-seven factual findings supporting its ultimate ruling were not

supported by competent evidence. Because Plaintiff's challenges to the trial court's factual findings inform our analysis as to whether her first two issues presented have merit, we first address Plaintiff's challenges to the evidentiary sufficiency of the trial court's factual findings.

A. North Carolina Civil Procedure Rule 9(j)

"Rule 9(j) serves as a gatekeeper, enacted by the legislature, to prevent frivolous malpractice claims by requiring expert review *before* filing of the action." *Vaughan v. Mashburn*, ___ N.C. ___, ___, 817 S.E.2d 370, 375 (2018) (quoting *Moore v. Proper*, 366 N.C. 25, 31, 726 S.E.2d 812, 817 (2012)). The Rule mandates that a medical malpractice complaint "shall be dismissed unless"

> [t]he pleading specifically asserts that the medical care and all medical records pertaining to the alleged negligence . . . have been reviewed by a person [(1)] who is *reasonably expected to qualify as an expert witness* under Rule 702 of the Rules of Evidence and [(2)] *who is willing to testify* that the medical care did not comply with the applicable standard of care[.]

N.C. Gen. Stat. § 1A-1, Rule 9(j)(1) (2017) (emphases added). However, "a complaint facially valid under Rule 9(j) may be dismissed if subsequent discovery establishes that the certification is not supported by the facts, at least to the extent that the exercise of reasonable diligence would have led the party to the understanding that its expectation was unreasonable." *Moore*, 366 N.C. at 31–32, 726 S.E.2d at 817 (internal citations omitted).

"Because Rule 9(j) requires certification at the time of filing that the necessary expert review has occurred, compliance or noncompliance with the Rule is determined at the time of filing[,]" *id.* at 31, 726 S.E.2d at 817 (citations omitted), and "when conducting this analysis, a court should look at 'the facts and circumstances known or those which should have been known to the pleader' at the time of filing[,]" *id.* (quoting *Trapp v. Maccioli*, 129 N.C. App. 237, 241, 497 S.E.2d 708, 711 (1998)).

B. Standard of Review

We review *de novo* a trial court's dismissal of a medical malpractice complaint for substantive Rule 9(j) noncompliance. *Estate of Wooden ex rel. Jones v. Hillcrest Convalescent Ctr., Inc.*, 222 N.C. App. 396, 403, 731 S.E.2d 500, 506 (2012) (citations omitted). Where, as here, "a trial court determines a Rule 9(j) certification is not supported by the facts, 'the court must make written findings of fact to allow a reviewing

appellate court to determine whether those findings are supported by competent evidence, whether the conclusions of law are supported by those findings, and, in turn, whether those conclusions support the trial court's ultimate determination.' " *Id.* (quoting *Moore*, 366 N.C. at 32, 726 S.E.2d at 818).

Additionally, because Rule 9(j) imposes multiple threshold pleading requirements that must be satisfied to survive dismissal, each one must be factually supported in order to be substantively compliant with Rule 9(j). Thus, if subsequent discovery establishes a facially valid certificate has no factual support for one of Rule 9(j)'s strict pleading requirements, a medical malpractice complaint is properly dismissed for substantive Rule 9(j) noncompliance. *See*, *e.g.*, *McGuire v. Riedle*, 190 N.C. App. 785, 788, 661 S.E.2d 754, 758 (2008) (affirming dismissal for substantive Rule 9(j) noncompliance solely on the ground that the "[p]laintiff did not present the trial court with an expert who was 'willing to testify that the medical care did not comply with the applicable standard of care.' " (quoting N.C. Gen. Stat. § 1A-1, Rule 9(j)(1))).

C. Sufficiency of Factual Findings

The trial court here entered twenty-seven findings supporting its ultimate decision to dismiss Plaintiff's complaint for substantive Rule 9(j) noncompliance. In her brief, Plaintiff challenges only the evidentiary sufficiency of factual findings 22, 24, and 27, rendering the remaining twenty-four findings binding on appeal. *Ingram v. Henderson Cty. Hosp. Corp., Inc.*, ___ N.C. App. ___, ___, 815 S.E.2d 719, 733 (2018) (citation omitted). We thus first address the evidentiary sufficiency of each challenged finding, and then assess whether the trial court's findings supported its conclusions and ultimate decision.

1. Factual Finding 22

Plaintiff first challenges factual finding 22, which reads: "Dr. Toporoff . . . admitted that Dr. Movahed's involvement was limited to the interpretation of the nuclear stress test that was performed on Mr. Preston." During his deposition, Dr. Toporoff specifically confirmed that "Dr. Movahed's involvement in this case is the interpretation of the nuclear stress test that was performed on Mr. Preston[.]" This exchange supplied competent evidence to support the finding.

Plaintiff argues the finding was erroneous because "the nuclear stress test involves two parts: the exercise treadmill stress test and the nuclear heart images" and "Dr. Toporoff was critical of Dr. Movahed's interpretation of the . . . exercise treadmill portion, which revealed

issues with Mr. Preston's heart requiring immediate further testing." Plaintiff's explanation of the NST does not make the challenged finding erroneous, nor does it contradict or undermine the competent evidence supporting the finding. Moreover, "[t]he well-established rule is that findings of fact by the trial court supported by competent evidence are binding on the appellate courts even if the evidence would support a contrary finding." *Scott v. Scott*, 336 N.C. 284, 291, 442 S.E.2d 493, 497 (1994) (citation omitted)).

2. Factual Finding 24

Plaintiff next challenges factual finding 24, which reads: "Dr. Toporoff only agreed to testify in the Second Lawsuit if Plaintiff's counsel retained a nuclear cardiologist." She argues this finding was erroneous because Dr. Toporoff (1) opined in his Rule 9(j) affidavits that Preston's medical care failed to comply with the standard of care and "expressed [his] willingness to testify to the above if called upon to do so"; and (2) testified when deposed that, at the time he signed his second Rule 9(j) affidavit prior to the filing of the second lawsuit, he "felt comfortable saying that Dr. Movahed failed to meet the standard of care as to the interpretation of the exercise treadmill test."

When deposed, Dr. Toporoff testified that during his initial prelawsuit review before Plaintiff filed her first complaint against the hospitalists, he said to Plaintiff that he would not add Dr. Movahed to the lawsuit unless she got another nuclear cardiologist to interpret the images because Dr. Toporoff "did not want to get into an across-the-table where [Dr. Movahed was] highly competent in that field on paper and [he] ha[d] no business criticizing his summaries." After Dr. Toporoff acknowledged he was unqualified to testify against Dr. Movahed as a nuclear cardiologist, he explained: "[T]hat's how [Dr. Movahed's] name got added later [to the second lawsuit]. I refused to be a nuclear cardiologist against [Dr. Movahed]." Later, when asked whether he wanted to change any answers to his prior testimony, Dr. Toporoff stated:

> At the beginning, I just wanted to make it clear, because I remember a conversation I had with [Plaintiff's attorney], that I would not testify against Dr. Movahed unless she came up with a nuclear cardiologist because I did not want to be across from him where he's talking about nuclear images and I have to say, I know nothing. And once we agreed that she would get somebody else, then I felt I could handle myself clinically.

The above testimony, including Dr. Toporoff's testimony that "he would not testify against Dr. Movahed unless [Plaintiff] came up with a nuclear cardiologist" provides competent evidence directly supporting the trial court's challenged finding number 24 that "Dr. Toporoff only agreed to testify in the Second Lawsuit if Plaintiff's counsel retained a nuclear cardiologist." To the extent Plaintiff argues that Dr. Toporoff's Rule 9(j) affidavits or other deposition testimony may have supported a different finding, "findings of fact by the trial court supported by competent evidence are binding on the appellate courts even if the evidence would support a contrary finding." *Id.* (citation omitted). We overrule this argument.

Although unnecessary to our resolution of this issue, we nonetheless address Plaintiff's argument that "Dr. Toporoff consistently and sufficiently indicated his ability to render opinions regarding the treadmill stress test and the communication failure of those results." To support this argument, Plaintiff emphasizes Dr. Toporoff's later deposition testimony in which he confirmed he "had opinions separate and apart from the NST images" and was "comfortable . . . when [he] did the 9(j) affidavit[ ] . . . saying that Dr. Movahed failed to meet the standard of care as it applies to a cardiologist interpreting a treadmill stress test[.]"

Dr. Toporoff's statement that he "had opinions separate and apart from the NST images" was immediately followed by his confirmation that he "didn't feel as confident expressing those [opinions] until [he] had some kind . . . of support for the NST images as well." Moreover, merely having an opinion does not indicate one's willingness to testify as to that opinion. Additionally, Dr. Toporoff's confirmation that he was "comfortable . . . when [he] did the 9(j) affidavit . . . saying that Dr. Movahed failed to meet the standard of care as it applies to a cardiologist interpreting a treadmill stress test" was not an unequivocal assertion that he was "willing to testify" against Dr. Movahed. Regardless of whether Dr. Toporoff had opinions or was comfortable saying something about Dr. Movahed regarding the treadmill-stress-test component of interpreting the NST, Dr. Toporoff's testimony considered contextually establishes that his *willingness* to testify against Dr. Movahed in any capacity was conditioned upon having the support of a nuclear cardiologist who was competent and willing to testify against Dr. Movahed as to the nuclear-imaging component.

3. Factual Finding 27

Plaintiff next challenges factual finding 27, which reads: "[A]s of the date the Second Lawsuit was filed, Plaintiff had no cardiologist

competent or willing to testify against . . . Dr. Movahed . . . ." Plaintiff argues this finding was unsupported because "[t]he record makes clear that Dr. Toporoff was able and willing to testify against Dr. Movahed, and . . . was qualified to do so."

The unchallenged findings establish that Dr. Toporoff was Plaintiff's only Rule 9(j) pre-lawsuit review cardiologist, and the two nuclear cardiologists were consulted months after the second lawsuit was filed and after the statute of limitations had expired. Having concluded above that Dr. Toporoff's testimony supported challenged factual finding 24—"Dr. Toporoff only agreed to testify in the Second Lawsuit if Plaintiff's counsel retained a nuclear cardiologist"—that finding, along with unchallenged factual finding 8 establishing that Plaintiff failed to retain a nuclear cardiologist until months after she filed the second lawsuit, support the part of challenged finding 27 that "as of the date the Second Lawsuit was filed, Plaintiff had no cardiologist . . . willing to testify against . . . Dr. Movahed . . . ."

In light of our conclusion that competent evidence supported that part of the finding that no cardiologist was willing to testify against Dr. Movahed at the time Plaintiff filed her second lawsuit, we need not address the sufficiency of evidence supporting that part of the finding as to whether Dr. Toporoff was competent to testify in any capacity against Dr. Movahed. *See Vaughan*, ___ N.C. at ___, 817 S.E.2d at 375 ("[R]ule [9(j)] averts frivolous actions by precluding any filing in the first place by a plaintiff who is unable to procure an expert who *both* meets the appropriate qualifications and, after reviewing the medical care and available records, is willing to testify that the medical care at issue fell below the standard of care." (emphasis added)).

D. Sufficiency of Legal Conclusions

Having concluded challenged factual findings 22, 24, and the no cardiologist willing to testify portion of finding 27 were supported by competent evidence, our review is whether those findings and the trial court's remaining unchallenged findings supported its conclusions and ultimate decision to dismiss Plaintiff's complaint for substantive Rule 9(j) noncompliance.

The trial court made the following relevant factual findings:

> 2. . . . Mr. Preston . . . had a nuclear stress test ("NST") conducted.
>
> 3. The NST was interpreted by an attending nuclear cardiologist . . . , Dr. Movahed.

. . . .

8. On February 12, 2016, [Plaintiff] filed a second malpractice lawsuit . . . .

. . . .

10. This Second Lawsuit alleges that Dr. Movahed . . . w[as] negligent in [his] care and treatment of Mr. Preston prior to his discharge from VMC.

. . . .

12. The Second Lawsuit . . . contained a certification paragraph that was facially compliant with Rule 9(j). . . .

13. . . . Plaintiff identified two 9(j) expert witnesses: Dr. Stuart Toporoff, a non-nuclear cardiologist . . . , and Dr. Andy Pierce, a hospitalist . . . .

14. On December 15, 2016, Plaintiff formally designated her expert witnesses, which, in addition to Drs. Toporoff and Pierce, included two nuclear cardiologists, Dr. Mark Travin . . . and Dr. Salvadore Borges-Neto . . . .

15. Plaintiff does not contend, nor would the record support, that these two nuclear cardiologists were consulted with, or agreed to provide testimony, prior to the Plaintiff filing either of the two lawsuits.

16. On March 31, 2017, Defendants deposed Dr. Pierce, who admitted that he is not a cardiologist and, therefore, is "not really the person to critique Movahed."

. . . .

19. On March 23, 2017, Defendants [deposed] Dr. Toporoff, a clinical cardiologist. Dr. Toporoff admitted that he is not a nuclear cardiologist, and has never interpreted nuclear stress tests.

. . . .

22. Dr. Toporoff . . . admitted that Dr. Movahed's involvement was limited to the interpretation of the nuclear stress test that was performed on Mr. Preston.

23. Dr. Toporoff . . . testified that he had no business criticizing and did not feel competent criticizing Dr. Movahed's

> interpretation of the NST, and that he "would look like a fool trying to interpret the [NST] images." Dr. Toporoff further testified that he "would not testify against Dr. Movahed unless [Plaintiff's attorney] came up with a nuclear cardiologist [expert]."
>
> 24. Accordingly, Dr. Toporoff only agreed to testify in the Second Lawsuit if Plaintiff's counsel retained a nuclear cardiologist.
>
> 25. Plaintiff did not consult with [nuclear cardiologist] Dr. Travin until March 30, 2016.
>
> 26. Plaintiff did not consult with [nuclear cardiologist] Dr. Borges-Neto until mid-November, 2016.
>
> 27. Accordingly, as of the date the Second Lawsuit was filed, Plaintiff had no cardiologist . . . willing to testify against . . . Dr. Movahed . . . .

Upon the findings, the trial court made the following relevant legal conclusions:

> 31. Dr. Toporoff's deposition testimony demonstrated that, at the time the Second Lawsuit was filed, he was "not willing" to testify that the medical care at issue failed to comply with the applicable standard of care.
>
> . . . .
>
> 34. Dr. Pierce testified that he had no opinions that were critical of the medical care provided by Dr. Movahed . . . .
>
> 35. As Mr. Preston died February 13, 2014, Plaintiff had two years to file a medical malpractice action. . . .
>
> 36. As of the date that the statute of limitations expired for the Second Lawsuit, February 13, 2016, Plaintiff had not complied with Rule 9(j).
>
> 37. Despite the fact that Plaintiff subsequently obtained a nuclear cardiologist willing to testify regarding Dr. Movahed, it was only after the Second Lawsuit had been filed and after the statute of limitations had expired. . . .

We hold these findings support the conclusions, and the conclusions support the trial court's ultimate determination that "Plaintiff has failed to comply with the requirements of Rule 9(j) in regard to her

Complaint in the Second Lawsuit, and that therefore, [her complaint] should be dismissed in its entirety, with prejudice." Specifically, finding 13 establishes that Dr. Toporoff was Plaintiff's only Rule 9(j) cardiologist who had reviewed Preston's care before the second lawsuit was filed. Finding 24 establishes that Dr. Toporoff only agreed to testify against Dr. Movahed if Plaintiff hired a nuclear cardiologist. And findings 14, 15, 25, and 26 establish that Plaintiff failed to consult with the nuclear cardiologists she retained until months after she filed the second lawsuit. Those findings support the part of finding 27 that, "as of the date the Second Lawsuit was filed, Plaintiff had no cardiologist . . . willing to testify against . . . Dr. Movahed . . . ." These findings support the trial court's dispositive conclusion that "Plaintiff has failed to comply with the requirements of Rule 9(j) in regard to her Complaint in the Second Lawsuit" and its ultimate decision to dismiss her complaint for substantive Rule 9(j) noncompliance. *Cf. Thigpen v. Ngo*, 355 N.C. 198, 204, 558 S.E.2d 162, 166–67 (2002) ("Allowing a plaintiff to file a medical malpractice complaint and to then wait until after the filing to have the allegations reviewed by an expert would pervert the purpose of Rule 9(j)."). Accordingly, we affirm the trial court's order.

In light of our holding that the trial court's findings and conclusions supported its determination that Plaintiff failed to substantively comply with Rule 9(j)'s requirement of securing a pre-lawsuit review medical expert willing to testify against Dr. Movahed, we need not address Plaintiff's remaining challenges to the sufficiency of the findings or conclusions supporting the trial court's additional determination that Plaintiff failed to substantively comply with Rule 9(j)'s requirement that it was reasonable for Plaintiff to expect Dr. Toporoff to qualify as an expert witness against Dr. Movahed. *Cf. McGuire*, 190 N.C. App. at 788, 661 S.E.2d at 758 (affirming dismissal of a medical malpractice complaint for substantive Rule 9(j) noncompliance solely on the ground that the "[p]laintiff did not present the trial court with an expert who was 'willing to testify . . . .' " (citation omitted)); *id.* at 788 n.1, 661 S.E.2d at 758 n.1 ("We decline to address the parties' arguments regarding Dr. Majors' review of the care given. In order to satisfy the Rule 9(j)(1) requirements, plaintiff's expert must have been willing to testify. Because he was not so willing, it is irrelevant whether he in fact reviewed the care that plaintiff received.").

III. Conclusion

Because the trial court's findings supported by Dr. Toporoff's deposition testimony established that his willingness to testify against Dr. Movahed was conditioned upon Plaintiff securing a nuclear cardiologist,

both of whom were consulted and retained months after she filed her second complaint and the applicable statute of limitations period had expired, no factual support existed for that part of Plaintiff's Rule 9(j) certification that her second complaint had been "reviewed by a person . . . willing to testify that the medical care did not comply with the applicable standard of care." Accordingly, we affirm the trial court's order granting Defendant's motion to dismiss Plaintiff's complaint for substantive Rule 9(j) noncompliance.

AFFIRMED.

Judges TYSON and ZACHARY concur.

STATE OF NORTH CAROLINA
v.
TYRONE MARCERO CHEVALLIER

No. COA18-860

Filed 5 March 2019

1. Evidence—hearsay—exceptions—co-conspirator—prima facie case of conspiracy

A drug dealer's statement over the phone, "them are my boys, deal with them," was admissible under the hearsay rule's co-conspirator exception (Evidence Rule 801(d)(E)) where the State established a prima facie case of conspiracy between the drug dealer and three men in a car (including defendant). The undercover officer had successfully purchased cocaine from the drug dealer at the same location on two prior occasions, and the drug dealer had agreed to sell the officer one ounce of cocaine at the same location for $1,200—the same amount of counterfeit cocaine that the men in the car attempted to sell him at the agreed-upon place and time.

2. Drugs—attempted sale and delivery—counterfeit controlled substance—acting in concert—sufficiency of evidence

There was sufficient evidence to send the charges of attempted sale of a counterfeit controlled substance and delivery of a counterfeit controlled substance, under the theory of acting in concert, to the jury where a police detective agreed to purchase cocaine from a drug dealer, defendant and two others arrived in a car at the agreed-upon place with a plastic bag of white powder, defendant

instructed the officer to enter their car, and the white substance was later determined to be counterfeit cocaine. However, because the acts underlying both charges arose from a single transaction, the jury was improperly allowed to convict defendant of two offenses (attempted sale and delivery).

3. Firearms and Other Weapons—possession—actual—personal custody—on floor of vehicle

There was sufficient evidence to charge the jury on "actual" firearm possession where defendant was sitting in the front passenger seat of a vehicle, he had his hands low to the floor of the vehicle, and upon opening the vehicle's door an officer found a firearm on the floor where defendant's hands had been.

Appeal by Defendant from judgments entered 30 November 2017 by Judge Jeffery B. Foster in Duplin County Superior Court. Heard in the Court of Appeals 17 January 2019.

Attorney General Joshua H. Stein, by Assistant Attorney General Neal T. McHenry, for the State.

James R. Parish for Defendant.

COLLINS, Judge.

Defendant Tyrone Marcero Chevallier appeals judgments entered upon jury verdicts of guilty of possession of a firearm by a felon, possession with intent to sell a counterfeit controlled substance, attempted sale of a counterfeit controlled substance, and delivery of a counterfeit controlled substance, and upon Defendant's guilty plea of having attained habitual felon status. The charges against Defendant resulted from his participation in a drug transfer which was foiled by police. We find no merit in Defendant's challenges to the trial court's evidentiary rulings or jury instructions.

I. Procedural History and Factual Background

At trial, the State's evidence tended to show the following: Detective Michael Tyndall of the Duplin County Police Department was participating in an undercover sting operation targeting cocaine dealer James Williams. On 29 July 2015, Detective Tyndall, along with a confidential informant, purchased cocaine from Williams at a Bojangles restaurant in Warsaw. A few days later, Detective Tyndall attempted to make a second purchase from Williams, but the deal fell through due to a conflict

between Williams and the confidential informant. As a result, Williams gave Detective Tyndall his cell phone number with instructions to contact him directly in the future. Detective Tyndall contacted Williams directly and set up another purchase of cocaine at the same Bojangles in Warsaw. On 7 August 2015, Detective Tyndall completed a second purchase of cocaine from Williams.

On 20 October 2015, Detective Tyndall called Williams' cell phone to set up a third purchase of cocaine. After a few phone calls back and forth negotiating price, Williams agreed to sell Detective Tyndall one ounce of cocaine for $1,200.00, and instructed Detective Tyndall to call him back when he was ready to complete the exchange. The next day, on 21 October 2015, Detective Tyndall called Williams and they agreed to meet at the same Bojangles restaurant in Warsaw to effectuate the sale. Williams informed Detective Tyndall he was on his way. Detective Tyndall arrived at the Bojangles with $1,200.00 and parked his car to wait for Williams to arrive. A team of hidden officers surveilled the area from nearby.

After waiting about twenty minutes, Detective Tyndall called Williams again; Williams said he was on his way and to keep waiting. Detective Tyndall then heard yelling coming from behind his vehicle. He saw a car with three occupants, including Defendant, had parked behind his vehicle. The men waved Detective Tyndall over to their car. While still on the phone with Williams, Detective Tyndall walked over and told the men he was waiting for Williams. The man sitting in the backseat leaned forward, held up a plastic bag of white powder, and told Detective Tyndall he knew him from previous drug transactions. At that point, Williams told Detective Tyndall, "them are my boys, deal with them" and then hung up the phone.

When Detective Tyndall walked back to the car, Defendant told him to get in and shut the door. Detective Tyndall told him he first needed to get his scale. He retrieved his scale from his vehicle and then returned to the car with the men. Detective Tyndall opened the door, sat down on the edge of the car seat, and placed his scale on the center console in the back of the vehicle. The man holding the plastic bag of white powder placed it on Detective Tyndall's scale. As soon as Detective Tyndall saw that the weight registered one ounce—the amount of cocaine Williams had agreed to sell him for $1,200.00—he signaled the surveilling officers for a takedown. The substance was still on the scale when the men in the car spotted the officers. As the driver of the car started trying to drive away, Detective Tyndall grabbed the white powder off the

scale; however, the backseat passenger ripped the bag out of Detective Tyndall's hands. The car was quickly stopped.

When an arresting officer approached the passenger-side door where Defendant was sitting, he observed that Defendant's hands were low and not visible, so he instructed Defendant to show him his hands. Defendant hesitated but eventually complied. The officer immediately opened the passenger-side door and discovered a long firearm lying upside down on the floor of the vehicle between the seat and door, with its handgrip facing up, right where he had observed Defendant's lowered hand to be. Defendant was arrested and charged with several drug-related offenses as well as possession of a firearm by a felon. A Duplin County Grand Jury indicted Defendant for conspiracy to sell cocaine, conspiracy to deliver cocaine, possession with intent to sell or deliver a counterfeit controlled substance, attempted sale of a counterfeit controlled substance, delivery of a counterfeit controlled substance, and having attained habitual felon status. Defendant was tried by a jury on 27 November 2017. The cocaine-related charges were dismissed at the close of the State's evidence. The jury found Defendant guilty on all remaining charges, and Defendant later pled guilty to having attained habitual felon status.

Defendant was sentenced as a habitual felon. Judgment was entered on the possession of a firearm by a felon conviction, imposing a sentence of 135 to 174 months imprisonment. A consolidated judgment was entered on the attempted sale or delivery of a counterfeit controlled substance convictions, imposing a concurrent sentence of 50 to 72 months imprisonment. Finally, judgment was entered on the possession with intent to sell or deliver a counterfeit controlled substance conviction, imposing a concurrent sentence of 50 to 72 months imprisonment. From the judgments entered upon the jury's guilty verdicts, Defendant appeals.

II. Issues

On appeal, Defendant contends the trial court erred by (1) admitting a hearsay statement under Rule 801(d)(E)'s co-conspirator exception; (2) denying his motion to dismiss for insufficient evidence of attempted sale of a counterfeit controlled substance; (3) denying his motion to dismiss for insufficient evidence of delivery of a counterfeit controlled substance; and (4) instructing the jury on the theory of "actual" possession for the possession of a firearm by a felon charge.

III. Discussion

A. Co-conspirator Hearsay Exception

[1] Defendant first contends the trial court erred by admitting into evidence Williams' statement "them are my boys, deal with them" under the co-conspirator exception to the rule against hearsay. *See* N.C. Gen. Stat. § 8C-1, Rule 801(d)(E) (2017). He argues Williams' statement was inadmissible under the co-conspirator exception because the State failed to prove a conspiracy existed between Williams and the three men in the car, including Defendant. We disagree.

1. Standard of Review

We review *de novo* a properly preserved objection to the admission of hearsay evidence. *State v. Hicks*, 243 N.C. App. 628, 638, 777 S.E.2d 341, 348 (2015) (citation omitted).

2. Analysis

" 'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." N.C. Gen. Stat. § 8C-1, Rule 801(c) (2017). Generally, hearsay is inadmissible. *State v. Valentine*, 357 N.C. 512, 515, 591 S.E.2d 846, 851 (2003) (citation omitted). However, an exception to the general rule against hearsay exists for a statement "offered against a party and . . . made by a coconspirator of such party during the course and in furtherance of the conspiracy." N.C. Gen. Stat. § 8C-1, Rule 801(d)(E).

To be admissible under the co-conspirator hearsay exception, the State's evidence must "establish that: '(1) a conspiracy existed; (2) the acts or declarations were made by a party to it and in pursuance of its objectives; and (3) while it was active, that is, after it was formed and before it ended.' " *Valentine*, 357 N.C. at 521, 591 S.E.2d at 854 (quoting *State v. Lee*, 277 N.C. 205, 213, 176 S.E.2d 765, 769–70 (1970)). The State must prove "a *prima facie* case of conspiracy, without reliance on the statement at issue." *Valentine*, 357 N.C. at 521, 591 S.E.2d at 854 (citations omitted). "In establishing the *prima facie* case, the State is granted wide latitude, and the evidence is viewed in a light most favorable to the State." *Id.* (citations omitted).

"A criminal conspiracy is an express or implied agreement between two or more persons to do an unlawful act. . . ." *State v. Barnes*, 345 N.C. 184, 216, 481 S.E.2d 44, 61 (1997) (citation omitted).

> In order to prove conspiracy, the State need not prove an express agreement; evidence tending to show a mutual,

> implied understanding will suffice. Nor is it necessary that the unlawful act be completed. As soon as the union of wills for the unlawful purpose is perfected, the offense of conspiracy is completed.

State v. Morgan, 329 N.C. 654, 658, 406 S.E.2d 833, 835 (1991) (internal quotation marks and citations omitted). Stated differently, although "[t]he State's burden of proof is to produce evidence sufficient to permit the jury to find the existence of a conspiracy, . . . [it need not] produce evidence sufficient to compel the jury to find a conspiracy." *State v. Williams*, 345 N.C. 137, 142, 478 S.E.2d 782, 784–85 (1996) (citations omitted).

Here, Detective Tyndall testified he had on three prior occasions planned buys of cocaine from Williams. The two successful transactions occurred at the Bojangles restaurant in Warsaw, and Williams had personally delivered the cocaine to Detective Tyndall in exchange for cash. On 20 October 2015, Detective Tyndall contacted Williams for a third purchase, and Williams agreed to sell Detective Tyndall one ounce of cocaine for $1,200.00. On 21 October 2015, Williams agreed to meet Detective Tyndall at the same Bojangles in Warsaw to effectuate this third buy. When Detective Tyndall arrived at the prearranged meeting place and Williams failed to show, he called Williams on the phone. Detective Tyndall was talking to Williams when he was met by three men who had parked behind Detective Tyndall's vehicle. They waved him over to their car.

The man in the back seat displayed a plastic bag of white powder. After Detective Tyndall told the men he was waiting for Williams, the man holding the powder told Detective Tyndall he knew him from prior drug transactions, and Detective Tyndall was instructed to get in the car and shut the door. Detective Tyndall told the men he needed to get his scale, retrieved the scale, opened the backseat door, and sat down in the car with the three men, who all appeared to be looking around and fidgeting nervously. The man holding the bag of white powder placed it on Detective Tyndall's scale, which registered the exact weight of cocaine Williams had agreed to sell Detective Tyndall for $1,200.00 the day prior.

Based upon our review of this evidence in the light most favorable to the State, we conclude the State satisfied its burden of establishing a *prima facie* case of conspiracy between Williams and the three men, including Defendant. Williams' statement, "them are my boys, deal with them," made in furtherance of the objective to transfer Detective Tyndall an unlawful substance, merely provided further support for the showing

of the conspiracy. Thus, the trial court did not err in admitting the challenged statement under Rule 801(d)(E)'s co-conspirator exception.

Despite conceding that Williams "may have . . . told his people in the car to bring cocaine[,]" Defendant primarily argues that because the men instead brought counterfeit cocaine, there was no "agreement or union of wills" between Williams and the men, and thus "no conspiracy." We disagree.

Defendant fails to supply controlling legal authority to support this argument. *See* N.C. R. App. P. 28(b)(6). Moreover, it is irrelevant whether the unlawful substance the men brought to effectuate Williams' planned drug transaction with Detective Tyndall was actual cocaine, proscribed by N.C. Gen. Stat. § 90-95(a)(1) (2017), or counterfeit cocaine, proscribed by N.C. Gen. Stat. § 90-95(a)(2) (2017). The State's evidence here was sufficient to establish a *prima facie* case of conspiracy by way of an agreement between Williams and the men to "do an unlawful act," *Barnes*, 345 N.C. at 216, 481 S.E.2d at 61—that is, to transfer an unlawful substance by sale or delivery to Detective Tyndall in violation of N.C. Gen. Stat. § 90-95(a). *Cf. Valentine*, 357 N.C. at 522, 591 S.E.2d at 855 ("In finding the existence of a criminal conspiracy, jurors are allowed to make the logical inference that 'one who conspires to bring about a result intends the accomplishment of that result, or of *anything which naturally flows from its attempted accomplishment*.' " (quoting *State v. Small*, 301 N.C. 407, 419, 272 S.E.2d 128, 136 (1980))).

Accordingly, we overrule Defendant's argument.

B. Attempted Sale or Delivery of a Counterfeit Controlled Substance Charges

[2] Defendant next contends the trial court erred by denying his motions to dismiss for insufficient evidence the charges of attempted sale of a counterfeit controlled substance and delivery of a counterfeit controlled substance.

1. Standard of Review

We review *de novo* a trial court's denial of a motion to dismiss a criminal charge for insufficient evidence. *See State v. Crockett*, 368 N.C. 717, 720, 782 S.E.2d 878, 881 (2016) (citation omitted). The scope of judicial review is "whether there is substantial evidence of each essential element of the crime and that the defendant is the perpetrator." *State v. Chekanow*, 370 N.C. 488, 492, 809 S.E.2d 546, 549 (2018) (citation omitted). "Substantial evidence is that amount of relevant evidence necessary to persuade a rational juror to accept a conclusion." *Id.* (citation

omitted). In determining whether substantial evidence was adduced to withstand a motion to dismiss, we "consider all evidence admitted, whether competent or incompetent, in the light most favorable to the State, giving the State the benefit of every reasonable inference and resolving any contradictions in its favor." *Id.* at 492, 809 S.E.2d at 549–50 (citation omitted).

2. Analysis

It is unlawful for a person "[t]o manufacture, sell or deliver, or possess with intent to manufacture, sell or deliver, a counterfeit controlled substance." N.C. Gen. Stat. § 90-95(a)(2). This statute establishes three separate offenses: "(1) *manufacture* of a [counterfeit] controlled substance, (2) *transfer* of a [counterfeit] controlled substance by sale or delivery, and (3) *possession with intent to manufacture, sell or deliver* a [counterfeit] controlled substance." *State v. Moore*, 327 N.C. 378, 381, 395 S.E.2d 124, 126 (1990) (interpreting N.C. Gen. Stat. § 90-95(a)(1)[1]). "To prove sale and/or delivery of a [counterfeit] controlled substance, the State must show a transfer of a [counterfeit] controlled substance by either sale or delivery, or both." *State v. Carr*, 145 N.C. App. 335, 341, 549 S.E.2d 897, 901 (2001) (citing *Moore*, 327 N.C. at 382, 395 S.E.2d at 127).

Our Supreme Court has defined a "sale" in this context as "a *transfer* of property for a specified price payable in money." *Moore*, 327 N.C. at 382, 395 S.E.2d at 127 (quoting *State v. Creason*, 313 N.C. 122, 129, 326 S.E.2d 24, 28 (1985)). An attempted sale in this context requires the intent to sell and an overt act done for that purpose which goes beyond mere preparation, but which falls short of the completed sale. *See State v. Melton*, ___ N.C. ___, ___, 821 S.E.2d 424, 428 (2018) (citations omitted). Our Controlled Substances Act defines " '[d]eliver' or 'delivery' " as "the actual[,] constructive, or attempted transfer from one person to another of a controlled substance. . . ." N.C. Gen. Stat. § 90-87(7) (2017).

The State proceeded upon the principle of acting in concert in an attempt to prove Defendant acted in concert with Williams and the two other men in the car in the commission of the attempted sale or delivery of a counterfeit controlled substance. Under the doctrine of acting in concert, when two or more persons act together in pursuance of a common plan or purpose, each is guilty of any crime committed by any other

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1. The statutory language of subsection (a)(1) interpreted in *Moore* mirrors that of subsection (a)(2) save only for the unlawful substance identified. *Compare* N.C. Gen. Stat. § 90-95(a)(1) (identifying a "controlled substance"), *with id.* § 90-95(a)(2) (identifying a "counterfeit controlled substance").

in pursuance of the common plan or purpose. *State v. Barts*, 316 N.C. 666, 688, 343 S.E.2d 828, 843 (1986) (citations omitted).

Here, Detective Tyndall testified he had twice before purchased cocaine from Williams at the Bojangles restaurant in Warsaw and contacted Williams again on 20 October 2015 for a third purchase. Williams, after negotiations, agreed to sell Detective Tyndall one ounce of cocaine for $1,200.00 the next day at the same Bojangles in Warsaw where the two prior buys occurred. On 21 October 2015, when Detective Tyndall arrived at the prearranged meeting place expecting to meet up with Williams, after about twenty or thirty minutes three men in an unknown car parked behind Detective Tyndall's vehicle. The three men yelled to Detective Tyndall and waved him over to their car, as one displayed a plastic bag containing white powder.

While Detective Tyndall was speaking on the phone with Williams attempting figure out his whereabouts to effectuate the planned buy, Detective Tyndall told the men in the car he was waiting for Williams, and Williams stated, "them are my boys, deal with them" and then hung up. When Detective Tyndall reengaged the men, the one holding the plastic bag of white powder stated he knew Detective Tyndall from prior drug transactions, and Defendant instructed Detective Tyndall to enter the car and close the door.

After Detective Tyndall informed the men he needed to get his scale, Detective Tyndall retrieved a scale from his vehicle and returned, partially entering the men's car. The man holding the substance placed it on Detective Tyndall's scale, and its weight registered one ounce, the amount of cocaine Williams agreed to sell Detective Tyndall for $1,200.00. Detective Tyndall then immediately signaled the takedown, and police intervention prevented the men from actually delivering the substance to Detective Tyndall, or Detective Tyndall from actually delivering the money to the men. The white powder was later determined not to be a controlled substance but counterfeit cocaine.

Viewing this evidence and all reasonable inferences therefrom in the light most favorable to the State, including Williams' and the other men's acts performed in furtherance of effectuating the transaction, we conclude the State presented sufficient evidence of transferring a counterfeit controlled substance under both the attempted sale and delivery theories of transfer. *See State v. Squires*, 357 N.C. 529, 535, 591 S.E.2d 837, 841 (2003) (holding defendant's "possess[ing] the drugs and scales while attempting to effectuate the sale [were] sufficient to establish both intent and an act in preparation of an actual transfer of cocaine" and

thus "sufficient to satisfy the elements of attempted sale of cocaine"); *State v. Beam*, 201 N.C. App. 643, 648, 688 S.E.2d 40, 44 (2010) (holding sufficient evidence existed to sustain a charge of unlawful transfer of a controlled substance by delivery where, after planning a drug transaction with an undercover officer posing as a buyer, the defendant got out of her vehicle, went to the trunk, and retrieved the drugs; "re-entered the vehicle, took the drugs out of her purse, and told [the undercover officer] to put the money on the dashboard of her vehicle"; but was arrested before handing the undercover officer the drugs). Defendant's argument is overruled.

However, "[t]he transfer by sale or delivery of a [counterfeit] controlled substance is one statutory offense, the gravamen of the offense being the transfer of the drug." *Moore*, 327 N.C. at 383, 395 S.E.2d at 127. A violation of N.C. Gen. Stat. § 90-95(a)(2) arising from a "single transaction involving transfer of a [counterfeit] controlled substance" constitutes "one criminal offense, which is either committed by either or both of two acts—sale or delivery." *Id.* at 382, 395 S.E.2d at 126–27. Thus, while "[a] defendant may be indicted and tried under N.C.G.S. § 90-95(a)([2]) in such instances for the transfer of a [counterfeit] controlled substance, whether it be by selling the substance, or by delivering the substance, or both[,]" *id.* at 382, 395 S.E.2d at 127, "a defendant may not[ ] . . . be convicted under N.C.G.S. § 90-95(a)([2]) of both the sale *and* the delivery of a [counterfeit] controlled substance arising from a single transfer[,]" *id.*

Here, Defendant was permissibly separately indicted and tried for transfer of a counterfeit controlled substance by both attempted sale and delivery arising from a single transaction. As concluded above, substantial evidence was presented to support both theories of transfer, and the trial court properly denied Defendant's motions to dismiss the attempted sale and delivery charges for insufficient evidence. However, the acts of attempted sale and delivery underlying both charges arose from a single transaction of the same counterfeit controlled substance. Accordingly, the jury in this case was improperly allowed to convict Defendant of two offenses— attempted sale and delivery—arising from a single transfer. *Moore*, 327 N.C. at 383, 395 S.E.2d at 127.

Defendant failed to raise or argue on appeal the improper conviction of two offenses arising from a single transfer. Thus, it is not before us. However, the failure to raise this issue does not preclude Defendant from filing a motion for appropriate relief in the trial court pursuant to N.C. Gen. Stat. § 15A-1415 (2017), does not preclude the trial court from considering a motion for appropriate relief *sua sponte* under N.C.

Gen. Stat. § 15A-1420(d) (2017), and does not prevent the parties to this action from entering into an agreement for appropriate relief under N.C. Gen. Stat. § 15A-1420(e) (2017).

C. Jury Instructions on Actual Possession of a Firearm

[3] Defendant next asserts the trial court erred when charging the jury on possession of a firearm by a felon. Over Defendant's objection that insufficient evidence was presented to support an instruction on the criminal liability theory of "actual" firearm possession, the trial court charged the jury on both "actual" and "constructive" possession theories. On appeal, Defendant again argues the evidence was insufficient to support an instruction on "actual" firearm possession. We disagree.

1. Standard of Review

We review *de novo* properly preserved sufficiency-of-the-evidence challenges to jury instructions. *State v. Osorio*, 196 N.C. App. 458, 466, 675 S.E.2d 144, 149 (2009) (citations omitted).

2. Analysis

The trial court must "fully instruct the jury on all substantial and essential features of the case embraced within the issue and arising on the evidence." *State v. Harris*, 306 N.C. 724, 727, 295 S.E. 2d 391, 393 (1982) (citation omitted). However, it is error for the trial court "to charge on matters which materially affect the issues when they are not supported by the evidence." *State v. Malachi*, ___ N.C. ___, ___, 821 S.E.2d 407, 416 (2018) (quotation marks and citation omitted). In determining whether the trial evidence adduced was sufficient to instruct on a particular theory of criminal liability, we review the evidence and any reasonable inference from that evidence in the light most favorable to the State. *Cf. State v. Anthony*, 354 N.C. 372, 425, 555 S.E.2d 557, 591 (2001) ("The evidence presented in this case, when considered in a light most favorable to the State, was sufficient to warrant the trial court's instruction on flight."). An instruction on a criminal liability theory is proper when "there is some evidence in the record reasonably supporting the theory. . . ." *State v. Taylor*, 362 N.C. 514, 540, 669 S.E.2d 239, 261 (2008) (quotation marks and citation omitted). Additionally, "challenges to jury instructions allowing juries to convict criminal defendants on the basis of legal theories that lack evidentiary support are . . . subject to harmless error analysis. . . ." *Malachi*, ___ N.C. at ___, 821 S.E.2d at 422.

The State must prove two elements to establish the crime of possession of a firearm by a felon: (1) defendant was previously convicted of a felony; and (2) thereafter possessed a firearm. N.C. Gen. Stat. § 14-415.1

(2017). Possession may be actual or constructive. *Malachi*, ___ N.C. at ___, 821 S.E.2d at 416 (citation omitted). "Actual possession requires that a party have physical or personal custody of the item." *Id.* (quotation marks and citation omitted). "[A]ctual possession may be proven by circumstantial evidence . . . ." *State v. McNeil*, 359 N.C. 800, 813, 617 S.E.2d 271, 279 (2005). Constructive possession exists when the defendant, "while not having actual possession, . . . has the intent and capability to maintain control and dominion over" the firearm. *State v. Beaver*, 317 N.C. 643, 648, 346 S.E.2d 476, 480 (1986) (citations omitted).

When viewing the evidence adduced in the light most favorable to the State, we conclude it was sufficient to support an instruction on the theory of actual possession of a firearm. Detective Tyndall testified that he observed Defendant "fidgeting and looking around, nervous, acting as if he was the lookout over the vehicle." Officer Miller testified that when approaching the men's vehicle to effectuate the arrest, he observed Defendant sitting in the front passenger seat and "[a]t that point in time his hands were low" and not visible, so Officer Miller "told [Defendant] to get his hands where [he] could see them." Although Defendant eventually complied, "[h]e was slow to show [Officer Miller] his hands." Immediately thereafter, Officer Miller opened the front passenger door where defendant was sitting and observed a "weapon in between the seat . . . and the passenger[-]side door, right where [Defendant's] right hand was." Officer Miller later explained:

> At that point in time is when I told him, let me see your hands, let me see your hands. I couldn't see his hands. I don't know what he's doing. He finally put his hands up where I could see them.
>
> At that point in time I opened this door. When I opened the door, this is the first thing I saw was that weapon laying right there, right beside him, right beside his right hand, where it was.

Additionally, the State admitted into evidence without objection a picture of the firearm as it was found in the vehicle. That image depicts a long rife lying on the floor of the vehicle between the passenger-side seat and door, with its handgrip facing up, precisely where Officer Miller testified Defendant's hand was lowered and could hold the firearm's handgrip. Although the firearm was not found on Defendant's person, when viewing this evidence in the light most favorable to the State, we conclude the evidence was sufficient to show Defendant had "personal custody" of the firearm and thus was sufficient to support the trial court's

instruction on the theory of actual possession of a firearm. *See McNeil*, 359 N.C. at 813, 617 S.E.2d at 279 (concluding evidence was "sufficient to support a jury finding of actual possession" when an officer observed the defendant "repeatedly go 'over the top of a chair with his arm' " while resisting arrest; that he again "observed [the] defendant's arm 'go' over the armchair" after he was handcuffed; and that the defendant later admitted 'the [twenty-two individually wrapped rocks of crack cocaine found in the armchair] was his").

Even presuming, *arguendo*, this evidence was insufficient to support an instruction on actual possession, Defendant could not establish prejudice—that is, a reasonable possibility that, had the court omitted the actual possession instruction, a different result would have been reached at trial. *See State v. Lee*, 370 N.C. 671, 676, 811 S.E.2d 563, 567 (2018) (citation omitted).

At trial, Defendant conceded the "constructive possession should go to the jury instructions" but objected to the instruction on actual possession. On appeal, although Defendant recites the showing required to support an instruction for constructive possession, he does not seriously dispute the sufficiency of evidence to support it, instead primarily arguing that "the evidence presented at trial did not support a theory of actual possession." To support his showing of prejudice, Defendant argues that instructing on both actual and constructive possession theories "likely created confusion on the part of the jury, which sent a note out asking to see the photograph that showed the firearm in the car." Defendant alleges that the jury's note to the trial court evidences the jury's confusion concerning the theories of possession. We disagree and conclude that the jury's note, standing alone, does not establish prejudice. *See Malachi*, ___ N.C. at ___, 821 S.E.2d at 422 (reasoning in part that the fact that the jury asked for further instructions concerning the possession issue did not tend to show prejudice, given the absence of any explanation for why the jury might have sought clarification of the meaning of possession).

Given the strong, undisputed, and credible evidence of Defendant's possession of a firearm based upon a constructive-firearm-possession theory, even if the trial court erred by also instructing on actual possession, Defendant has failed to satisfy his burden of demonstrating prejudice. *See id.* at ___, 821 S.E.2d at 421 ("[I]n the event that the State presents exceedingly strong evidence of defendant's guilt on the basis of a theory that has sufficient support and the State's evidence is neither in dispute nor subject to serious credibility-related questions, it is unlikely

that a reasonable jury would elect to convict the defendant on the basis of an unsupported legal theory." (footnote omitted)). Defendant's argument is overruled.

IV. Conclusion

We find no merit in Defendant's challenges to the trial court's evidentiary rulings or jury instructions.

NO ERROR.

Judges TYSON and ZACHARY concur.

STATE OF NORTH CAROLINA
v.
JAMES A. COX

No. COA18-692

Filed 5 March 2019

1. Robbery—with a dangerous weapon—felonious intent—good-faith claim to the money demanded

The State failed to present substantial evidence of conspiracy to commit robbery with a dangerous weapon where defendant and two others entered the home of another person (a go-between for drug purchases) to obtain money that they believed was their own property. Because the go-between kept defendant's and his alleged co-conspirators' money rather than purchasing drugs for them, they held a good-faith claim to the money and there was no evidence of felonious intent to deprive the go-between of her property.

2. Burglary and Unlawful Breaking or Entering—felonious—predicate felony not proven—elements sufficient for misdemeanor

Where the State failed to present sufficient evidence that defendant had the necessary felonious intent for conspiracy to commit robbery with a dangerous weapon, there was likewise insufficient evidence to convict defendant of felonious breaking and entering predicated on the felony of robbery with a dangerous weapon. The matter was remanded for entry of judgment on the lesser-included offense of misdemeanor breaking or entering.

Appeal by Defendant from Judgments entered 16 January 2018 by Judge William W. Bland in Onslow County Superior Court. Heard in the Court of Appeals 28 January 2019.

Attorney General Joshua H. Stein, by Assistant Attorney General James D. Concepción, for the State.

The Law Office of Bruce T. Cunningham, Jr., by Bruce T. Cunningham, Jr., for defendant-appellant.

HAMPSON, Judge.

Factual and Procedural Background

James A. Cox (Defendant) appeals from his convictions for Conspiracy to Commit Armed Robbery with a Dangerous Weapon and Felonious Breaking or Entering.[1] The evidence presented at trial tends to show the following:

Sometime prior to the night of 8 August 2015, Defendant gave Richard Linn (Linn) $20.00 to purchase Percocet tablets or other drugs. Linn testified he regularly used Angela Leisure (Leisure) as a go-between to purchase drugs. On this occasion, Linn added his own money to Defendant's and gave Leisure approximately $50.00 or $60.00. Leisure admitted she never purchased the drugs and never returned the money to Linn.

Linn further testified on the evening of 8 August 2015, Defendant and his girlfriend, Ashley Jackson (Jackson), arrived at Linn's house and demanded he come outside. Defendant was standing outside with a gun in his hand and told Linn to "get in the car." Linn stated Defendant and Jackson wanted to go to Leisure's house "to talk to her about their money." After getting in the car, Linn directed Defendant to Leisure's house.

Leisure's boyfriend, Daniel McMinn (McMinn), testified he was standing outside of Leisure's home when Defendant, Jackson, and Linn arrived. Jackson asked McMinn where Leisure was. Jackson and Defendant entered the house and McMinn followed. After entering the home, Jackson attacked Leisure by pulling her hair, punching her, and forcing her to the ground. Leisure recalled Jackson saying, "give me my money" or "give me the money." McMinn testified he reached for his cell

1. Defendant was also convicted of Discharging a Weapon into an Occupied Property but raises no arguments on appeal regarding this offense.

phone to call the police, but he stopped when he saw Defendant display a handgun "in a threatening way."

After several minutes of fighting, Linn called Jackson off, saying: "I think she's had enough. Come on, let's go." Defendant, Jackson, and Linn left the house. Linn testified once outside Defendant turned and kicked a hole in the door. Defendant also fired a shot into Leisure's home, which struck a mirrored door inside the home. Defendant, Jackson, and Linn left Leisure's home without obtaining any money or personal property.

Based on these events, Defendant was arrested and charged with First-Degree Burglary, Conspiracy to Commit Robbery with a Dangerous Weapon, and Discharging a Weapon into an Occupied Property.[2] Following the State's presentation of evidence, Defendant moved to dismiss all charges. This Motion was denied.

Subsequently, Defendant presented evidence, including his own testimony. Defendant's evidence tended to show he went to Linn's house on 8 August 2015 to give Linn $20.00 to purchase pain relievers for Jackson. Later in the evening, Linn requested Defendant pick him up because Leisure had taken the money and would not answer his phone calls. Linn said he would talk to Leisure in person and get Defendant's money back. Defendant claimed no one, including himself, had a weapon on 8 August 2015 and that Jackson kicked in the door, not Defendant. At the close of all the evidence, Defendant renewed his Motion to Dismiss all charges, which the trial court denied.

After instructing the jury, the trial court provided the jury with written copies of its jury instructions. After deliberating for approximately two hours, the jury returned a note with two questions related to the Conspiracy charge: The first question stated, "Can we get clarification of 'While the defendant knows that the defendant is not entitled to take the property,' " which was part of the definition in the jury instructions on Conspiracy to Commit Robbery with a Dangerous Weapon. The jury's second question asked, "Is it still Robbery to take back one owns [sic] property?" After conferring with counsel, and without any objection by Defendant's trial counsel, the trial court declined to answer the jury's two questions directly. Instead, the trial court referred the jury back to its written copy of the jury instructions.

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2. Jackson was charged as a co-defendant with Conspiracy to Commit Robbery with a Dangerous Weapon, First-Degree Burglary, and Simple Assault, and their cases were joined for trial.

On 16 January 2018, the jury returned a verdict finding Defendant guilty of Felonious Breaking or Entering, Conspiracy to Commit Robbery with a Dangerous Weapon, and Discharging a Weapon into an Occupied Property. The trial court entered a consolidated judgment on the Conspiracy to Commit Robbery with a Dangerous Weapon and Discharging a Weapon into an Occupied Property charges, sentencing Defendant to a minimum of 60 months and a maximum of 84 months in the custody of the North Carolina Department of Adult Correction. On the Felonious Breaking or Entering charge, Defendant received a suspended sentence of 6 to 17 months and was placed on supervised probation for a term of 24 months. Defendant gave oral notice of appeal at trial. This Court has jurisdiction to hear Defendant's appeal under N.C. Gen. Stat. § 7A-27(b)(1) (2017) and N.C.R. App. P. 4(a)(1).

Issues

Defendant raises several issues including whether the trial court committed plain error in refusing to answer the jury's questions or whether his trial counsel committed ineffective assistance of counsel by failing to request further instructions in response to the jury's questions. However, the dispositive issues in this case, raised by Defendant, are whether the trial court: (1) erroneously denied Defendant's Motion to Dismiss the charge of Conspiracy to Commit Robbery with a Dangerous Weapon at the close of all the evidence; and (2) erroneously denied Defendant's Motion to Dismiss the charge of Felonious Breaking or Entering at the close of all the evidence.

Analysis

Defendant contends the trial court erred in denying his Motion to Dismiss the Conspiracy to Commit Robbery with a Dangerous Weapon and Felonious Breaking or Entering convictions based upon the sufficiency of the evidence. Defendant argues the State presented no evidence Defendant possessed the requisite felonious intent necessary for these two convictions. We agree.

I. Standard of Review

This Court has stated:

> The standard for ruling on a motion to dismiss is whether there is substantial evidence (1) of each essential element of the offense charged and (2) that defendant is the perpetrator of the offense. Substantial evidence is relevant evidence which a reasonable mind might accept as adequate to support a conclusion. In ruling on a motion to

> dismiss, the trial court must consider all of the evidence in the light most favorable to the State, and the State is entitled to all reasonable inferences which may be drawn from the evidence. Any contradictions or discrepancies arising from the evidence are properly left for the jury to resolve and do not warrant dismissal.

State v. Wood, 174 N.C. App. 790, 795, 622 S.E.2d 120, 123 (2005) (citations and quotation marks omitted). "This Court reviews the trial court's denial of a motion to dismiss *de novo*." *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007) (citation omitted).

II. Conspiracy to Commit Robbery with a Dangerous Weapon

[1] "In order to prove a criminal conspiracy, the State must show an agreement between two or more persons to do an unlawful act or to do a lawful act in an unlawful way." *State v. Gray*, 56 N.C. App. 667, 672, 289 S.E.2d 894, 897 (1982) (citation omitted). In this case, the State had the burden to present substantial evidence tending to show that Defendant and Jackson agreed to commit each element of Robbery with a Dangerous Weapon against Leisure.

"For the offense of robbery with a dangerous weapon, the State must prove '(1) the unlawful taking or attempt to take personal property from the person or in the presence of another; (2) by use or threatened use of a firearm or other dangerous weapon; (3) whereby the life of a person is endangered or threatened.' " *State v. Pratt*, 161 N.C. App. 161, 163, 587 S.E.2d 437, 439 (2003) (quoting *State v. Wiggins*, 334 N.C. 18, 35, 431 S.E.2d 755, 765 (1993)); *see also* N.C. Gen. Stat. § 14-87(a) (2017). The taking or attempted taking must be done with felonious intent. *State v. Norris*, 264 N.C. 470, 472, 141 S.E.2d 869, 871 (1965) (quoting *State v. Lawrence*, 262 N.C. 162, 163-68, 136 S.E.2d 595, 597-600 (1964)). Our Supreme Court has stated, "Felonious intent is an essential element of the crime of robbery with firearms and has been defined to be the intent to deprive the owner of *his goods* permanently and to appropriate them to the taker's own use." *State v. Brown*, 300 N.C. 41, 47, 265 S.E.2d 191, 196 (1980) (citations omitted).

Under existing North Carolina case law, a defendant can negate the element of felonious intent by showing he took or attempted to take the property under a bona fide claim of right or title to the property. *See State v. Spratt*, 265 N.C. 524, 144 S.E.2d 569 (1965). In *Spratt*, our Supreme Court stated, "A defendant is not guilty of robbery if he forcibly takes personal property from the actual possession of another under a *bona fide claim of right or title to the property*, or for the personal protection

and safety of defendant and others, or as a frolic, prank or practical joke, or under color of official authority." *Id.* at 526-27, 144 S.E.2d at 571 (emphasis added) (citations omitted). *Spratt*, in turn, relied on a line of cases including *State v. Lawrence*. In *Lawrence*, the defendant was charged with robbery after assaulting the victim because defendant claimed the victim "owed him something." 262 N.C. at 168, 136 S.E.2d at 600. In granting a new trial, the Supreme Court held the defendant was entitled to a jury instruction on felonious intent where the conflicting evidence could permit a finding the taking was without felonious intent. *Id.*; *see also* N.C.P.I.—Crim. 217.10 n.4 (June 2016) (pattern jury instruction for Common Law Robbery specifically providing: "In the event that a defendant relies on claim of right, the jury should be told that if the defendant honestly believed he was entitled to take the property, he cannot be guilty of robbery").[3]

Decisions from this Court, however, have questioned *Spratt* and rejected the notion that a defendant cannot be guilty of armed robbery where the defendant claims a good-faith belief that he had an ownership interest in the property taken.[4] *See State v. Oxner*, 37 N.C. App. 600, 604, 246 S.E.2d 546, 548 (1978) ("We renounce the notions that force be substituted for voluntary consent and violence be substituted for due process of law."), *judgment aff'd without precedential value*, 297 N.C. 44, 252 S.E.2d 705 (1979); *State v. Willis*, 127 N.C. App. 549, 552, 492 S.E.2d 43, 45 (1997). *Oxner* presented similar facts as the case at bar: a claim of money owed related to a drug deal and a charge of robbery with a firearm. 37 N.C. App. at 602-04, 246 S.E.2d at 547-48. However, on review, our Supreme Court divided equally, leaving this Court's opinion without precedential value. Moreover, *Oxner* differs from this case in that there: (A) the defendant denied taking any property at all; and

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3. We note the pattern jury instructions for Robbery with a Firearm, Attempted Robbery with a Firearm, and Robbery with a Dangerous Weapon Other than a Firearm do not include such express language specific to this claim of right defense. *Compare* N.C.P.I.—Crim. 217.10 (June 2016) (Common Law Robbery), *with* N.C.P.I.—Crim. 217.20 (June 2018) (Robbery with a Firearm), N.C.P.I.—Crim. 217.25 (May 2003) (Attempted Robbery with a Firearm), *and* N.C.P.I.—Crim. 217.30 (June 2018) (Robbery with a Dangerous Weapon – Other than a Firearm). However, the element of felonious intent is required for all of these offenses. *See Spratt*, 265 N.C. at 526, 144 S.E.2d at 571 (citation omitted).

4. A review of other jurisdictions reveals a split across the country on whether a bona fide claim of right defense precludes an armed robbery conviction. *See generally* Kristine Cordier Karnezis, Annotation, *Robbery, Attempted Robbery, or Assault to Commit Robbery, as Affected by Intent to Collect or Secure Debt or Claim*, 88 A.L.R.3d 1309 (1978 & Supp. 2018).

(B) the claim was vague and related to an unliquidated amount. *See id.* at 604, 246 S.E.2d at 548. Here, the claim was for specific amounts, there was no dispute Defendant—along with Linn and Jackson—intended to recoup their money, and even Leisure admitted she owed the money.

In *Willis*, the defendant contended the State was required to prove the victim actually owned the property taken in order for the offense to constitute armed robbery. 127 N.C. App. at 551-52, 492 S.E.2d at 44-45. This Court rejected this argument and held in the absence of any evidence showing the defendant had an ownership interest in the property, the bona fide claim of right, or "self-help," defense simply did not apply. *Id.* In reaching its decision, however, this Court did question the ongoing viability of *Spratt*. *Id.* at 552, 492 S.E.2d at 45. Nevertheless, to the extent *Willis* is construed as conflicting with the earlier Supreme Court opinions in *Lawrence* and *Spratt*, among others, we conclude we remain bound to follow and apply *Spratt*. *See Respess v. Respess*, 232 N.C. App. 611, 625, 754 S.E.2d 691, 701 (2014) (citations omitted).

Here, unlike in *Willis*, the evidence at trial demonstrates Defendant, along with Linn and Jackson, went to Leisure's home to retrieve the money they provided to Leisure for the purchase of drugs. The witnesses for both the State and defense agreed Defendant, Linn, and Jackson were attempting to collect monies owed to them. Defendant testified he gave Linn the money to purchase drugs from Leisure; Linn told Defendant that he would talk to Leisure and get Defendant's money back; and that he, Jackson, and Linn went to Leisure's house in an attempt to recover their money. Both Linn and Leisure, who testified for the State, agreed that Defendant and Jackson went to Leisure's house to obtain money they believed was their property. After a thorough review of the record, we conclude the State presented no evidence tending to show Defendant possessed the necessary intent to commit robbery. Rather, all of the evidence proffered at trial supports Defendant's claim that Defendant, Linn, and Jackson went to Leisure's house to retrieve their own money. Therefore, under *Spratt*, Defendant could not be guilty of Conspiracy to Commit Robbery with a Dangerous Weapon because he—and his alleged co-conspirators—held a good-faith claim of right to the money. *See Spratt*, 265 N.C. at 526-27, 144 S.E.2d at 571.

Because there was no evidence suggesting Defendant had an intent to take and convert property belonging to another, the trial court erred in denying Defendant's Motion to Dismiss the charge of Conspiracy to Commit Robbery with a Dangerous Weapon. Consequently, we reverse the Judgment on that charge.

III. Felonious Breaking or Entering

[2] "The essential elements of felonious breaking or entering are (1) the breaking or entering (2) of any building (3) with the intent to commit any felony or larceny therein." *State v. Williams*, 330 N.C. 579, 585, 411 S.E.2d 814, 818 (1992) (citation omitted). Here, the trial court expressly instructed the jury that to convict Defendant of Felonious Breaking or Entering, it was required to find Defendant intended to commit Robbery with a Dangerous Weapon. As discussed above, the trial court erred in denying Defendant's Motion to Dismiss the charge of Conspiracy to Commit Robbery with a Dangerous Weapon because Defendant lacked the necessary felonious intent. Therefore, the trial court also erred in denying Defendant's Motion to Dismiss the charge of Felonious Breaking or Entering, which was expressly only predicated on the felony of Robbery with a Dangerous Weapon.

Nevertheless, the jury did find Defendant guilty of Felonious Breaking or Entering, including finding the State had proven all of the elements of that offense. "Misdemeanor breaking or entering, G.S. 14-54(b), is a lesser included offense of felonious breaking or entering and requires only proof of wrongful breaking or entry into any building." *State v. O'Neal*, 77 N.C. App. 600, 606, 335 S.E.2d 920, 924 (1985) (citations omitted). Misdemeanor Breaking or Entering does not require a finding of felonious intent. *See id.* As our holding above only negates the element of Defendant's felonious intent to commit Robbery with a Dangerous Weapon, the jury's verdict still supports finding Defendant guilty of Misdemeanor Breaking or Entering. We reverse and remand to the trial court to arrest judgment on the charge of Felonious Breaking or Entering and to enter judgment on Misdemeanor Breaking or Entering. *State v. Silas*, 168 N.C. App. 627, 635, 609 S.E.2d 400, 406 (2005) (citation omitted), *modified on other grounds and aff'd*, 360 N.C. 377, 627 S.E.2d 604 (2006).

Conclusion

Accordingly, we reverse the Defendant's conviction for Conspiracy to Commit Robbery with a Dangerous Weapon. Defendant did not challenge his conviction for Discharging a Weapon into an Occupied Property; however, we remand for resentencing because this offense was consolidated for judgment with Conspiracy to Commit Robbery with a Dangerous Weapon. Further, we reverse Defendant's conviction of Felonious Breaking or Entering and remand this matter for the trial

court to arrest judgment on Felonious Breaking or Entering and enter judgment against Defendant for Misdemeanor Breaking or Entering.

REVERSED IN PART AND REMANDED.

Chief Judge McGEE and Judge HUNTER concur.

STATE OF NORTH CAROLINA
v.
NACARRIAS T. JONES, DEFENDANT

No. COA18-176

Filed 5 March 2019

Search and Seizure—traffic stop—reasonable suspicion—frisk of defendant outside of vehicle—duration of stop

In a prosecution for multiple drug offenses, defendant's motion to suppress contraband was properly denied where the investigating officer had reasonable suspicion to initiate a traffic stop based on defendant's failure to wear a seatbelt, and the officer's lawful request that defendant exit the vehicle and submit to a weapons frisk did not prolong the stop beyond the time reasonably necessary to safely carry out the mission of the stop. The trial court's order was affirmed, even though the court based its denial on a different basis—that the officer had reasonable suspicion to extend the stop.

Appeal by defendant from judgment entered 23 October 2017 by Judge Imelda J. Pate in Sampson County Superior Court. Heard in the Court of Appeals 23 August 2018.

Attorney General Joshua H. Stein, by Assistant Attorney General Nick Benjamin, for the State.

Jeffrey William Gillette for defendant-appellant.

BERGER, Judge.

Nacarrias T. Jones ("Defendant") appeals the trial court's denial of his motion to suppress. Defendant argues his constitutional rights were violated when officers unnecessarily extended a traffic stop without reasonable suspicion. We disagree and affirm.

Factual and Procedural Background

On June 10, 2015, Defendant was a passenger in a rental car driven by Jelisa Simmons ("Simmons"). Deputies Ronie Robinson ("Deputy Robinson") and Dustin Irvin ("Deputy Irvin") with the Sampson County Sheriff's Department initiated a traffic stop of Simmons' vehicle because Defendant was not wearing a seatbelt. Deputy Irvin approached the passenger side of the vehicle and observed the passenger seat "leaned back very far" while Defendant was leaning forward with his head near his knees in "a very awkward position." Deputy Irvin also observed that Defendant's hands were around his waist and not visible to Deputy Irvin. Due to the way that Defendant was "bent forward," it appeared to Deputy Irvin that Defendant "was possibly hiding a gun." When Deputy Irvin introduced himself, Defendant glanced up at him, looked around the front area of the vehicle, but remained seated in the same awkward position. Deputy Irvin testified that, based upon his training and experience, Defendant's behavior was not typical.

When Deputy Irvin advised Defendant that the traffic stop was initiated because Defendant had not been wearing his seat belt, Defendant apologized. Deputy Irvin asked for Defendant's identification, but Defendant was unable to produce any document to verify his identity. However, Defendant stated that he was "not going to lie" about his identity. Deputy Irvin testified that, based upon his training and experience, use of the phrase "I'm not going to lie to you" or other similar phrases were signs of deception. Deputy Irvin asked Defendant to exit the vehicle due to Defendant's unusual behavior and because Defendant could not provide any identification.

During the suppression hearing, Deputy Irvin testified as follows:

> [Deputy Irvin:] I asked [Defendant] if he would step out of the vehicle.
>
> [The State:] And why did you do that?
>
> [Deputy Irvin:] Just based off of his behavior. First of all, I couldn't see his hands. He was leaned forward as if he was hiding something in his lap. And also—[Defendant] didn't have his identification. So for me to complete my action of investigating the seat belt violation, I would need to know who [Defendant] was, and for that, I would need his name, his date of birth, sometimes I would need an address, just depending on how common the name is. And to do that, I would need to run all of his information through our law enforcement database.

[The State:] And is that database something you have in your car?

[Deputy Irvin:] Yes. It is something we can pull up on our terminal inside of our patrol vehicle that's mounted inside the vehicle.

[The State:] And so it's mounted inside the vehicle?

[Deputy Irvin:] Yes.

[The State:] And is that going to pull up a photo?

[Deputy Irvin:] Yes. It will pull up any driver history, criminal history, and it will pull up photos of the individual.

[The State:] And is that part of why you would want him there, to look at his face, because the photo is going to be mounted in the car; is that right?

[Deputy Irvin:] Yes, that's correct.

. . . .

[The State:] . . . What would you have had to do if you didn't ask him out of the vehicle to go back with you to this database?

[Deputy Irvin:] Well, I would have, first of all, had to remember his name and date of birth and then where he was from, which I would have to get that information, walk back to my vehicle, and then if I was unable to locate his information in the database, I would have to return to the vehicle—to [Defendant's] vehicle to correct whatever information, you know, was wrong, and then return back to my patrol vehicle to again attempt to locate his information. . . .

[The State:] And now would that have taken you longer to walk back and forth?

[Deputy Irvin:] Yes, certainly.

[The State:] And would that be less safe for you?

[Deputy Irvin:] Yes. That would definitely be less safe because I would have to repeatedly approach the vehicle that we had pulled over, which when I initially approached the vehicle, I can see [Defendant], I can see the driver, and I know, you know, basically what's going on in the vehicle.

> But once I leave that vehicle to go back to my patrol vehicle, when I re-approach the suspect vehicle, I have no idea what's going on inside. They could have pulled weapons, they could have tried to hide narcotics. I have no idea once I have to re-approach.

When Defendant exited the vehicle, he turned and pressed the front of his body against the vehicle while he kept both hands around his waist. Deputy Irvin testified that "on numerous occasions," he had observed individuals involved in traffic stops get out of vehicles with their hands near their waistline who were later discovered to have had handguns concealed in their waistbands. Defendant denied having any weapons on him, and consented to a search of his person.

Defendant placed his left hand on top of the vehicle, but kept his right hand at his waistline. Because Defendant's pants were being worn below his waist, Deputy Irvin asked if he could pull Defendant's pants up. Defendant agreed and then placed his right hand on the vehicle. As Deputy Irvin was pulling up Defendant's pants, a large wad of paper towels fell out of Defendant's pants and onto the ground. Irvin asked what had fallen out, and Defendant stated, "Man, I already know," and placed his hands behind his back. Inside the paper towels, Deputy Irvin found a plastic bag which contained more than fifty-six grams of cocaine. Inside the vehicle, deputies seized a marijuana grinder, marijuana, marijuana "roaches," two cell phones, an empty plastic baggie, and two pills. Defendant claimed that he had found the bag of cocaine at the beach, along with the money, clothes, marijuana grinder, and marijuana. Defendant also stated that Simmons did not know anything about the contraband.

Defendant was arrested and charged with trafficking cocaine by possession, trafficking cocaine by transportation, possession with intent to sell and/or deliver cocaine, possession of drug paraphernalia, possession of marijuana, and possession of a Schedule IV controlled substance. He was subsequently indicted for trafficking cocaine by possession, trafficking cocaine by transportation, and possession with intent to sell and deliver cocaine.

On January 26, 2017, Defendant filed a motion to suppress in Sampson County Superior Court. In the January 31, 2017 order denying Defendant's motion to suppress, the trial court found that because Defendant had not provided Deputy Irvin with any form of identification, had been exhibiting evasive and nervous behavior while in the vehicle, and based on Deputy Irvin's training and experience,

reasonable suspicion had developed to support Deputy Irvin's extension of the traffic stop.

On October 23, 2017, Defendant entered an *Alford* plea of guilty to trafficking cocaine by possession, trafficking cocaine by transportation, possession with intent to sell or deliver, possession of marijuana, and possession of drug paraphernalia. Defendant was sentenced to an active term of thirty-five to fifty-one months in prison and ordered to pay a $50,000.00 fine. Defendant preserved his right to appeal the denial of his motion to suppress at the time he entered the guilty plea, and timely entered notice of appeal.

Defendant argues on appeal that the trial court erred when it denied his motion to suppress evidence that was obtained during the traffic stop. Specifically, Defendant contends Deputy Irvin and Deputy Robinson lacked reasonable suspicion to extend the traffic stop. We disagree.

Standard of Review

Our review of a trial court's denial of a motion to suppress is "strictly limited to determining whether the trial judge's underlying findings of fact are supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn support the judge's ultimate conclusions of law." *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982). "The trial court's conclusions of law . . . are fully reviewable on appeal." *State v. Hughes*, 353 N.C. 200, 208, 539 S.E.2d 625, 631 (2000).

Analysis

> The Fourth Amendment protects individuals against unreasonable searches and seizures . . . and the North Carolina Constitution provides similar protection . . . . A traffic stop is a seizure even though the purpose of the stop is limited and the resulting detention quite brief. . . . [A] traffic stop is permitted if the officer has a reasonable, articulable suspicion that criminal activity is afoot.

State v. Styles, 362 N.C. 412, 414, 665 S.E.2d 438, 439 (2008) (citations and quotation marks omitted). "Reasonable suspicion is a 'less demanding standard than probable cause and requires a showing considerably less than preponderance of the evidence.' " *State v. Barnard*, 362 N.C. 244, 247, 658 S.E.2d 643, 645 (2008) (quoting *Illinois v. Wardlow*, 528 U.S. 119, 123 (2000)). "The only requirement is a minimal level of objective justification, something more than an unparticularized suspicion or hunch." *State v. Otto*, 366 N.C. 134, 137, 726 S.E.2d 824, 827 (2012)

(citations and quotation marks omitted). "Moreover, a court must consider the totality of the circumstances—the whole picture in determining whether a reasonable suspicion exists." *Barnard*, 362 N.C. at 247, 658 S.E.2d at 645 (*purgandum*[1]). A traffic stop is a reasonable seizure under the Fourth Amendment when the police have reasonable suspicion "to believe that a traffic violation has occurred." *Styles*, 362 N.C. at 414-15, 665 S.E.2d at 440.

> The tolerable duration of police inquiries in the traffic-stop context is determined by the seizure's "mission"—to address the traffic violation that warranted the stop, and attend to related safety concerns. Because addressing the infraction is the purpose of the stop, it may last no longer than is necessary to effectuate that purpose. Authority for the seizure thus ends when tasks tied to the traffic infraction are—or reasonably should have been—completed.

Rodriguez v. United States, 575 U.S. ___, 191 L. Ed. 2d 492, 498 (2015) (*purgandum*).

Accordingly,

> [t]he duration of a traffic stop must be limited to the length of time that is reasonably necessary to accomplish the mission of the stop, unless reasonable suspicion of another crime arose before that mission was completed. The reasonable duration of a traffic stop, however, includes more than just the time needed to write a ticket. Beyond determining whether to issue a traffic ticket, an officer's mission includes ordinary inquiries incident to the traffic stop. These inquiries include checking the driver's license, determining whether there are outstanding warrants against the driver, and inspecting the automobile's registration and proof of insurance.
>
> In addition, an officer may need to take certain negligibly burdensome precautions in order to complete his mission safely. These precautions appear to include

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1. Our shortening of the Latin phrase "*Lex purgandum est.*" This phrase, which roughly translates "that which is superfluous must be removed from the law," was used by Dr. Martin Luther during the Heidelberg Disputation on April 26, 1518 in which Dr. Luther elaborated on his theology of sovereign grace. Here, we use *purgandum* to simply mean that there has been the removal of superfluous items, such as quotation marks, ellipses, brackets, citations, and the like, for ease of reading.

> conducting criminal history checks . . . . Safety precautions taken to facilitate investigations into crimes that are unrelated to the reasons for which a driver has been stopped, however, are not permitted if they extend the duration of the stop. But investigations into unrelated crimes during a traffic stop, even when conducted without reasonable suspicion, are permitted if those investigations do not extend the duration of the stop.

State v. Bullock, ___ N.C. ___, ___, 805 S.E.2d 671, 673-74 (2017) (*purgandum*), *cert. denied*, No. 18-924 (U.S. Feb. 25, 2019).

As a "precautionary measure" to "protect the officer's safety," a police officer may "as a matter of course" order the driver and passengers of a lawfully stopped car to exit his vehicle "during a stop for a traffic violation." *Maryland v. Wilson*, 519 U.S. 408, 412 (1997) (citations and quotation marks omitted). Because the officer's "safety interest stems from the mission of the stop itself[,] . . . any amount of time that the request to exit the rental car added to the stop was simply time spent pursuing the mission of the stop." *Bullock*, ___ N.C. at ___, 805 S.E.2d at 676 (citation and quotation marks omitted). Moreover, because "[t]raffic stops are especially fraught with danger to police officers," an officer may also lawfully frisk the defendant for weapons without "prolong[ing] a stop beyond the time reasonably required to complete the mission of the stop." *Id.* (*purgandum*). Because "traffic stops remain lawful only so long as unrelated inquires do not *measurably* extend the duration of the stop," a "frisk that lasts just a few seconds . . . d[oes] not extend the traffic stop's duration in a way that would require reasonable suspicion." *Id.* at ___, 805 S.E.2d at 676-77 (*purgandum*).

Here, the initiation of the traffic stop was justified by Deputy Irvin's observation that Defendant was not wearing his seatbelt as a passenger of a moving vehicle in violation of Section 20-135.2A(a). N.C. Gen. Stat. § 20-135.2A(a) (2017). Deputy Irvin's reasonable suspicion of Defendant's traffic violation permitted him to initiate the traffic stop.

From the moment the traffic stop was initiated, Deputy Irvin's conduct did not "prolong [the] stop beyond the time reasonably required to complete the mission of the stop." *Bullock*, ___ N.C. at ___, 805 S.E.2d at 676 (*purgandum*). Defendant was unable to provide any identification, and Deputy Irvin attempted to more efficiently conduct the requisite database checks and "complete the mission of the stop" by requesting Defendant exit the vehicle. In addition, Deputy Irvin "could and did lawfully ask [D]efendant to exit the rental vehicle" and was permitted to

frisk Defendant for weapons. *Id.* During the lawful frisk, cocaine fell to the ground from Defendant's person. Because Deputy Irvin's conduct did not extend the traffic stop's duration in any way, an additional showing that Deputy Irvin had reasonable suspicion of another crime was unnecessary. Accordingly, we affirm the trial court's denial of Defendant's motion to suppress.

It is immaterial that the trial court denied Defendant's motion to suppress upon a finding that Deputy Irvin had reasonable suspicion to extend the traffic stop.

> A correct decision of a lower court will not be disturbed on review simply because an insufficient or superfluous reason is assigned. The question for review is whether the ruling of the trial court was correct and not whether the reason given therefor is sound or tenable. The crucial inquiry for this Court is admissibility and whether the ultimate ruling was supported by the evidence.

State v. Austin, 320 N.C. 276, 290, 357 S.E.2d 641, 650 (1987) (citation omitted).

Conclusion

The trial court properly denied Defendant's motion to suppress.

AFFIRMED.

Judges TYSON and INMAN concur.

STATE OF NORTH CAROLINA
v.
TERANCE GERMAINE MALACHI, DEFENDANT

No. COA16-752-2

Filed 5 March 2019

Search and Seizure—anonymous tip—stop and frisk—reasonable suspicion—totality of the circumstances

In a prosecution for possession of a firearm by a felon, the trial court did not commit plain error by allowing evidence of a handgun officers removed from defendant's waistband during a stop and frisk, where the officers had reasonable suspicion to believe defendant illegally possessed a firearm and that he was armed and dangerous. Defendant's behavior—including "blading," or turning away to prevent the officers from seeing his weapon—and his failure to inform the officers he was lawfully armed as required by concealed carry statutes were sufficient to support the officers' stop and frisk.

Appeal by Defendant by writ of certiorari from judgment entered 28 January 2016 by Judge Yvonne M. Evans in Mecklenburg County Superior Court. Heard in the Court of Appeals 25 January 2017, decided 25 January 2017, reversed by the Supreme Court of North Carolina 7 December 2018 and remanded to the Court of Appeals.

Attorney General Joshua H. Stein, by Special Deputy Attorney General John R. Green, Jr., for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Constance E. Widenhouse, for Defendant-Appellant.

INMAN, Judge.

The trial court did not commit plain error by allowing evidence of a handgun a police officer removed from the waistband of a man in the course of stopping, seizing, and frisking him after forming a reasonable articulable suspicion that the suspect may have been engaged in unlawful conduct and was armed and dangerous.

Terance Germaine Malachi ("Defendant") appeals from his conviction for possession of a firearm by a felon following a jury trial and a related conviction for attaining habitual felon status. This is this Court's

second decision regarding Defendant's appeal, to resolve an issue not addressed in our initial decision.

Defendant argues that the trial court committed plain error by allowing the jury to hear evidence obtained as a result of an unconstitutional stop and seizure of Defendant. After careful review of the record and applicable law, we conclude that Defendant has failed to demonstrate plain error.

Factual and Procedural Background

An expanded summary of the factual and procedural background of this appeal can be found in our initial decision in *State v. Malachi*, ___ N.C. App. ___, 799 S.E.2d 645 (2017), *rev'd and remanded*, ___ N.C. ___, 821 S.E.2d 407 (2018). Below we summarize the facts and procedure pertinent to the single issue before us.

The evidence at trial tended to show the following:

Shortly after midnight on 14 August 2014, the Charlotte-Mecklenburg Police Department received a 911 call from an anonymous caller. The caller told the dispatcher that in the rear parking lot of a gas station located at 3416 Freedom Drive in Charlotte, North Carolina, an African American male wearing a red shirt and black pants had just placed a handgun in the waistband of his pants.

Officer Ethan Clark, in uniform and a marked car, first responded to the call. Officer Clark's arrival was followed almost immediately by Officer Jason Van Aken. Officer Clark saw about six to eight people standing in the parking lot, including a person who matched the description provided to the dispatcher and who was later identified as Defendant.

When Officer Clark got out of his car, Defendant looked directly at him, "bladed, turned his body away, [and] started to walk away." Officer Clark immediately approached Defendant and grabbed his arm. Officer Van Aken held Defendant's other arm and the two officers walked Defendant away from the crowd of people. Defendant was squirming. Officer Clark told Defendant to relax. Prior to this, neither officer spoke with Defendant.

Officer Clark placed Defendant in handcuffs and told him that he was not under arrest. Officer Van Aken then frisked Defendant and pulled a revolver from his right hip waistband. As the two officers seized the revolver, a third officer, Officer Kevin Hawkins, arrived. The officers then told Defendant he was under arrest and placed him in the back of Officer Clark's patrol vehicle.

Defendant was tried before a jury on charges of carrying a concealed weapon and possession of a firearm by a felon. Before evidence was presented, Defendant filed a motion to suppress all evidence of the revolver and argued that a police officer may not legally stop and frisk anyone based solely on an anonymous tip that simply described the person's location and description but that did not report any illegal conduct by the person. The trial court denied the motion. The State presented the challenged evidence at trial without objection by Defendant.

The jury returned a verdict of not guilty on the charge of carrying a concealed weapon and guilty of possession of a firearm by a felon. Defendant then pleaded guilty, pursuant to *N.C. v. Alford*, 400 U.S. 25, 27 L. Ed. 2d 162 (1970), to attaining habitual felon status. The trial court sentenced Defendant in the mitigated range to 100 to 132 months of imprisonment.

Analysis

Defendant argues that the trial court committed plain error by allowing the jury to hear evidence of the revolver police removed from his waistband in the course of stopping and frisking him in violation of his Fourth Amendment rights. Defendant concedes that because, after the trial court denied his motion to suppress this evidence, his trial counsel did not object when the evidence was offered at trial, our review is limited to plain error analysis. Our Supreme Court has recently reiterated the standards applicable to plain error review:

> [T]o demonstrate that a trial court committed plain error, the defendant must show that a fundamental error occurred at trial. To show fundamental error, a defendant must establish prejudice—that, after examination of the entire record, the error had a probable impact on the jury's finding that the defendant was guilty. Further, . . . because plain error is to be applied cautiously and only in the exceptional case, the error will often be one that seriously affect[s] the fairness, integrity or public reputation of the judicial proceedings.

State v. Maddux, ___ N.C. ___, ___, 819 S.E.2d 367, 371 (2018) (citations and quotation marks omitted) (second alteration in original). In applying this standard to the denial of a motion to suppress, "[o]ur review . . . is 'strictly limited to determining whether the trial judge's underlying findings of fact are supported by competent evidence, in which event they are binding on appeal, and whether those factual findings in turn

support the judge's ultimate conclusions of law.' " *State v. Williams*, ___ N.C. App. ___, ___, 786 S.E.2d 419, 425 (2016) (quoting *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982)). Those conclusions of law are reviewable *de novo*. *Williams*, ___ N.C. App. at ___, 786 S.E.2d at 425.

We hold that the trial court did not err, much less commit plain error, in denying Defendant's motion to suppress. This case is fundamentally controlled by *Terry v. Ohio*, 392 U.S. 1, 20 L. Ed. 2d 889 (1968), in which the Supreme Court of the United States held a police officer did not violate the Fourth Amendment to the United States Constitution when he stopped an individual and frisked him for weapons without probable cause. 392 U.S. at 30-31, 20 L. Ed. 2d at 911. Under *Terry*, a stop-and-frisk of an individual passes constitutional muster if: (1) the stop, at its initiation, was premised on a reasonable suspicion that crime may have been afoot; and (2) the officer possessed a reasonable suspicion that the individual involved was armed and dangerous. *See*, *e.g.*, *State v. Johnson*, 246 N.C. App. 677, 686, 783 S.E.2d 753, 760 (2016) (noting that "[p]ursuant to *Terry*, [an officer's] frisk of [a] defendant may only be justified by [these] two independent criteria"). Thus, Officers Clark and Van Aken lawfully stopped and frisked Defendant if they possessed reasonable suspicion: (1) that Defendant may have been involved in criminal activity at the time of the stop; and (2) that Defendant was armed and dangerous.

To satisfy the first element, the officer's reasonable suspicion must be "supported by articulable facts that criminal activity '*may* be afoot.' " *United States v. Sokolow*, 490 U.S. 1, 7, 104 L. Ed. 2d 1, 10 (1989) (emphasis added). Although "[t]he concept of reasonable suspicion, like probable cause, is not 'readily, or even usefully, reduced to a neat set of legal rules[,]' " it is not without limitation and definition:

> The officer, of course, must be able to articulate something more than an "inchoate and unparticularized suspicion or 'hunch.' " The Fourth Amendment requires "some minimal level of objective justification" for making the stop. That level of suspicion is considerably less than proof of wrongdoing by a preponderance of the evidence. We have held that probable cause means "a fair probability that contraband or evidence of a crime will be found," and the level of suspicion required for a *Terry* stop is obviously less demanding than that for probable cause.

Id. (citations omitted). Whether or not probable cause existed to execute the stop is determined "after considering the totality of circumstances

known to the officer." *State v. Jackson*, 368 N.C. 75, 78, 772 S.E.2d 847, 849 (2015).

Binding precedent requires the conclusion that the anonymous tip was insufficient, by itself, to supply Officer Clark with reasonable suspicion to stop Defendant. Although he was able to identify Defendant based on the tip, it did not indicate any illegal activity sufficient to give rise to reasonable suspicion standing alone:

> [a]n accurate description of a subject's readily observable location and appearance [in an anonymous tip] is of course reliable in this limited sense: It will help the police correctly identify the person whom the tipster means to accuse. Such a tip, however, does not show that the tipster has knowledge of concealed criminal activity. The reasonable suspicion here at issue requires that a tip be reliable in its assertion of illegality, not just in its tendency to identify a determinate person.

Florida v. J.L., 529 U.S. 266, 272, 146 L. Ed. 2d 254, 261 (2000). *In J.L.*, police received an anonymous tip that a young black male in a plaid shirt waiting at a bus stop was carrying a firearm. *Id.* at 268, 146 L. Ed. 2d at 258. Officers arrived at the scene, identified an individual matching that description, and, with "no reason to expect . . . illegal conduct" or any "threatening or unusual movements" on anyone's part, stopped the individual and frisked him, discovering a gun. *Id.* The defendant, a juvenile, was charged with possessing a firearm without a license and possessing a firearm while under the age of 18. *Id.* at 269, 146 L. Ed. 2d at 259. The Supreme Court held that this stop and frisk violated the Fourth Amendment, as the anonymous tip failed to reliably indicate illegal possession of a firearm such that it, standing alone, could provide reasonable suspicion to institute a *Terry* stop. *Id.* at 274, 146 L. Ed. 2d at 262.

But the officers' suspicion in this case was based on more than an anonymous tip. Unlike in *J.L.*, the record below and the trial court's findings disclose facts beyond the anonymous tip to support Officer Clark's reasonable suspicion that Defendant illegally possessed a firearm, including those facts specifically identified by the Supreme Court as lacking in that case. The unchallenged findings of fact made by the trial court and the uncontroverted evidence disclose that Officer Clark arrived on the scene in full uniform and a marked police car before making eye contact with Defendant. As Officer Clark was exiting his car, the Defendant "turned his body in such a way as to prevent the officer from observing a weapon." Officer Clark testified that he was trained

"on . . . some of the characteristics of armed suspects[,]" and that this kind of turn was known as "blading," as "[w]hen you have a gun on your hip you tend to blade it away from an individual. One of the indicators [of an armed person] is you turn and have your body between the other person and the firearm you're carrying." Defendant next began to move away. Officer Van Aken, who by then was on the scene, approached Defendant with Officer Clark; at no point prior to or during the approach did Defendant inform the officers that he was lawfully armed as required by our concealed carry statutes. *See* N.C. Gen. Stat. § 14-415.11(a) (2017) ("[W]henever the person is carrying a concealed handgun, [the person] shall disclose to any law enforcement officer that the person . . . is carrying a concealed handgun *when approached* or addressed by the officer[.]" (emphasis added)).[1]

Although we are unable to identify a prior North Carolina appellate decision holding reasonable suspicion existed under these particular facts, each individual fact present here has been cited to support a conclusion of reasonable suspicion as part of a totality of the circumstances analysis. *See, e.g.*, *State v. Butler*, 331 N.C. 227, 233, 415 S.E.2d 719, 722 (1992) ("[U]pon making eye contact with the uniformed officers, defendant immediately moved away, behavior that is evidence of flight[.]"); *State v. Garcia*, 197 N.C. App. 522, 529, 677 S.E.2d 555, 559 (2009) ("Factors to determine whether reasonable suspicion existed include . . . unprovoked flight." (citation omitted)); *State v. Watson*, 119 N.C. App. 395, 398, 458 S.E.2d 519, 522 (1995) ("[A]n officer's experience and

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2. Defendant argues that the trial court failed to make specific findings of fact that Defendant was aware that Officer Clark was a police officer, that he was aware Officer Clark was approaching him, or that he had time to speak with officers Clark and Van Aken before his seizure. However, the uncontroverted evidence of record shows that: (1) Defendant looked Officer Clark in the eyes; (2) Officer Clark was in full uniform and a marked vehicle; (3) Defendant "squared" to Officer Clark when he looked at him before blading his body; and (4) Defendant began to move away from Officer Clark as he was exiting the vehicle and approaching Defendant. There was no evidence introduced that Defendant was facing away from Officer Clark when he arrived, only that Defendant "bladed" by turning away, placing his body between Officer Clark and the firearm; Officer Clark testified that "when [he] exited [his] vehicle is when [Defendant] *turned and bladed* his body away." Thus, there is no evidence establishing that Clark approached Defendant from behind rather than from the side, or that Defendant walked away in the direct opposite direction from Officer Clark rather than a perpendicular one, such that Defendant would be unaware of his advance. Defendant declined to introduce any conflicting evidence as to what transpired, and "[i]n that event, the necessary findings are implied from the admission of the challenged evidence." *State v. Vick*, 341 N.C. 569, 580, 461 S.E.2d 655, 661 (1995). As we must view this uncontroverted evidence in the light most favorable to the State, *State v. Hunter*, 208 N.C. App. 506, 509, 703 S.E.2d 776, 779 (2010), the trial court found those facts concerning the issues identified by Defendant, to the extent that any were necessary, by implication in admitting the evidence.

training can create reasonable suspicion. Defendant's actions must be viewed through the officer's eyes." (citation omitted)); *State v. Sutton*, 232 N.C. App. 667, 681-82, 754 S.E.2d 464, 473 (2014) (holding that the defendant's "posturing [which] made it apparent that he was concealing something on his person" and subsequent failure to comply with Section 14-415.11(a) when approached, in addition to other facts in a totality of the circumstances analysis, gave rise to reasonable suspicion to conduct an investigatory stop). Given Defendant's "blading" after making eye contact with Officer Clark in his marked car and uniform, Defendant's movements away from Officer Clark as he was being approached, Officer Clark's training in identifying armed suspects, and Defendant's failure to comply with Section 14-415.11(a) when approached by the officers, we hold that the officers had reasonable suspicion under the totality of the circumstances to conduct an investigatory stop of Defendant in response to the tip identifying him as possessing a firearm at the gas station.

We now turn to whether the officers possessed reasonable suspicion that Defendant was armed and dangerous such that they were lawfully permitted to frisk him. We hold that such reasonable suspicion existed in accordance with North Carolina precedent and persuasive federal authority. In *State v. Rinck*, 303 N.C. 551, 280 S.E.2d 912 (1981), the North Carolina Supreme Court observed that "[i]f upon detaining [an] individual [pursuant to a lawful *Terry* stop], the officer's personal observations confirm that criminal activity may be afoot and suggest that the person detained may be armed, the officer may frisk him as a matter of self-protection." 303 N.C. at 559, 280 S.E.2d at 919 (citations omitted). This is certainly true where the officer has reasonable suspicion to believe the individual seized is unlawfully armed. *See Sutton*, 232 N.C. App. at 683-84, 754 S.E.2d at 474 (holding that facts giving rise to reasonable suspicion that the defendant was unlawfully carrying a firearm also supported a reasonable suspicion that the defendant was armed and dangerous).

The United States Court of Appeals for the Fourth Circuit has held, in an *en banc* decision, that an officer may lawfully conduct a frisk following a *Terry* stop if he "reasonably suspect[s] that the person is armed and therefore dangerous. . . . [T]he risk of danger is created simply because the person, who was forcibly stopped, is armed." *United States v. Robinson*, 846 F.3d 694, 700, *cert. denied*, 138 S. Ct. 379, 199 L. Ed. 2d 277 (2017) (underline in original). The Fourth Circuit also rejected the argument, raised by Defendant here, that a state's laws allowing for the public carrying of firearms might deprive the officer of reasonable suspicion:

> [T]he risk inherent in a forced stop of a person who is armed exists even when the firearm is legally possessed. The presumptive lawfulness of an individual's gun possession in a particular State does next to nothing to negate the reasonable concern an officer has for his own safety when forcing an encounter with an individual who is armed with a gun and whose propensities are unknown.

Id. at 701 (citing *United States v. Rodriguez*, 739 F.3d 481, 491 (10th Cir. 2013)).

As set forth *supra*, Officers Clark and Van Aken had reasonable suspicion to believe that Defendant unlawfully possessed a firearm at the time they stopped him. This reasonable suspicion of unlawful possession, coupled with Defendant's struggling during the stop and his continued failure to inform the officers that he was armed as required by Section 14-415.11(a), convince us that the officers also possessed reasonable suspicion to frisk him as a potentially armed and dangerous individual. *Sutton*, 232 N.C. App. at 683-84, 754 S.E.2d at 474.

Conclusion

For the above reasons, we hold the trial court did not err, much less commit plain error, in denying Defendant's motion to suppress or in allowing the jury to hear evidence challenged in the motion to suppress.

NO PLAIN ERROR.

Judges ARROWOOD and HAMPSON concur.

STEWART v. SHIPLEY

[264 N.C. App. 241 (2019)]

TILLIE STEWART, PLAINTIFF
v.
JAMES R. SHIPLEY, DPM, INSTRIDE MT. AIRY FOOT AND ANKLE SPECIALISTS, PLLC D/B/A MT. AIRY FOOT & ANKLE CENTER, AND NORTHERN HOSPITAL DISTRICT OF SURRY COUNTY, DEFENDANTS

No. COA18-745

Filed 5 March 2019

1. Appeal and Error—preservation of issues—specific grounds—adequacy of service

A medical malpractice plaintiff failed to preserve her argument that defendants should be estopped from asserting insufficiency of process as a defense. While plaintiff's trial counsel argued that defendants knew of the existence of the lawsuit because they filed motions for extension of time, trial counsel failed to further argue that these motions led plaintiff to rely to her detriment on the belief that defendants would not challenge the adequacy of service.

2. Process and Service—insufficiency—defense—estoppel

Principles of estoppel did not bar medical malpractice defendants from asserting that plaintiff failed to properly serve them with process. Defendants' motions for extension of time referred to "alleged service" and did not concede that the attempted service had been valid; further, there was a period of seven days between defendants' assertion of the defense of insufficiency of service of process and the last date on which plaintiff could have extended the summons.

Appeal by plaintiff from order entered 19 December 2016 by Judge Eric C. Morgan in Surry County Superior Court. Heard in the Court of Appeals 29 January 2019.

Pangia Law Group, by Amanda C. Dure and Joseph L. Anderson, for plaintiff-appellant.

Nelson Mullins Riley & Scarborough, LLP, by G. Gray Wilson and Lorin J. Lapidus, for defendants-appellees.

DAVIS, Judge.

In this case, we consider the circumstances under which a defendant is estopped from asserting the defense of insufficiency of service of

process. Plaintiff Tillie Stewart appeals from the trial court's dismissal of her complaint against defendants Dr. James R. Shipley and Instride Mt. Airy Foot and Ankle Specialists, PLLC (collectively the "Shipley Defendants"). In her appeal, she argues that principles of estoppel serve to bar the Shipley Defendants from asserting that they were not properly served with process in this lawsuit. After a thorough review of the record and applicable law, we affirm.

Factual and Procedural Background

On 19 November 2012, Stewart began treatment for plantar fasciitis pain in her left foot with Dr. Shipley at Mt. Airy Foot and Ankle Center in Mount Airy, North Carolina. After three months of treatment, Dr. Shipley recommended that Stewart undergo surgery on her left foot to alleviate her pain. The operation took place on 19 February 2013 at Northern Hospital of Surry County ("Northern"). Although Stewart had consented to surgery only on her left foot, Dr. Shipley first operated on her right foot and then repeated the procedure on her left foot. As a result, Stewart subsequently experienced significant pain in both feet.

Stewart filed a complaint in Surry County Superior Court on 18 February 2016 alleging claims of medical malpractice and battery against Dr. Shipley, Instride Mt. Airy Foot and Ankle Specialists, PLLC ("Instride"), and Northern. Summonses for all of the defendants were issued that same day.

On 29 February 2016, counsel for Stewart sent an email to Courtney Witt, a claims specialist for the Shipley Defendants' insurer, containing the complaint and summonses as attachments. In the email, Stewart's counsel inquired whether the Shipley Defendants would "accept service or if [Witt could] forward this to [the Shipley Defendants'] attorney." Witt responded that same day, stating that Stewart would "have to serve the insured" as the insurance company would "not be accepting service."

The Shipley Defendants filed a motion for an extension of time in which to respond to Stewart's complaint on 9 March 2016, which stated that the complaint had been "allegedly served on or about February 19, 2016." On 10 March 2016, a private process server delivered a summons and complaint to the registered agent for Instride. Instride subsequently filed an amended motion for extension of time on 31 March 2016, which the trial court granted that same day. In this motion, Instride stated that Stewart's complaint was "allegedly served on or about March 10 2016." A private process server delivered a summons and complaint to Dr. Shipley on 7 April 2016.

On 10 May 2016, the Shipley Defendants filed an answer asserting a number of defenses, including lack of personal jurisdiction and insufficiency of service of process pursuant to Rules 12(b)(2) and (5) of the North Carolina Rules of Civil Procedure. The Shipley Defendants also submitted affidavits from Kevin McDonald, the president of Instride, and Dr. Shipley. In their respective affidavits, McDonald and Dr. Shipley each stated that they had been handed a copy of the complaint with no accompanying summons by persons who did not identify their status or position.

On 25 August 2016, the Shipley Defendants filed a motion to dismiss the claims against them for failure to state a claim upon which relief may be granted under Rule 12(b)(6), lack of personal jurisdiction based on Rule 12(b)(2), and insufficiency of service of process pursuant to Rule 12(b)(5). A hearing on the Shipley Defendants' motion was held before the Honorable Eric C. Morgan on 14 November 2016. On 19 December 2016, the trial court issued an order granting the motion to dismiss based on improper service. The court determined that Stewart "did not attempt to have [the Shipley Defendants] served by the sheriff, and that the clerk of Surry County has not appointed plaintiff's process servers and, consequently, plaintiff's attempted service by private process servers is invalid under Rule 4[.]" Stewart gave timely notice of appeal to this Court.[1]

Analysis

"We review *de novo* questions of law implicated by the denial of a motion to dismiss for insufficiency of service of process. The trial court's factual determinations are binding on this court if supported by competent evidence." *New Hanover Cty. Child Support Enf't ex rel. Beatty v. Greenfield*, 219 N.C. App. 531, 533, 723 S.E.2d 790, 792 (2012) (internal citations omitted).

At the outset, it is important to note that Stewart does not claim that the trial court erred in holding her attempted service of process on the Shipley Defendants was invalid. Nor could such an argument be properly made under these circumstances.

This Court has stated the following regarding the use of private process servers:

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1. This case is before us for a second time. In *Stewart v. Shipley*, 805 S.E.2d 545, 2017 N.C. App. LEXIS 859 (2017) (unpublished), we dismissed Stewart's initial appeal as interlocutory. *Id.* at *7. On 26 March 2018, Stewart voluntarily dismissed Northern as a defendant, thereby rendering the trial court's 19 December 2016 order a final judgment. Stewart then filed a new notice of appeal from which the current appeal arises.

> Service must generally be carried out by the sheriff of the county where service is to occur. While the clerk of the issuing court may appoint an alternative person to carry out service, that clerk is not required or authorized to appoint a private process server as long as the sheriff is not careless in executing process.

B. Kelley Enters., Inc. v. Vitacost.com, Inc., 211 N.C. App. 592, 598, 710 S.E.2d 334, 339 (2001) (citation, brackets, and quotation marks omitted). We have also made clear that a defendant's actual notice of a lawsuit's existence is not by itself sufficient to confer personal jurisdiction over the defendant absent proper service of process.

> While a defective service of process may give the defending party sufficient and actual notice of the proceedings, such actual notice does not give the court jurisdiction over the party. Absent valid service of process, a court does not acquire personal jurisdiction over the defendant and the action must be dismissed.

Thomas & Howard Co. v. Trimark Catastrophe Servs., Inc., 151 N.C. App. 88, 91, 564 S.E.2d 569, 572 (2002) (internal citations and quotation marks omitted).

Stewart does not contend that she attempted to have the Shipley Defendants served by the sheriff or that the Surry County Clerk of Court appointed the private process servers who attempted to serve them. Instead, she asserts that even though she failed to properly serve them, they should be estopped from asserting insufficiency of service of process as a defense because (1) they filed motions for extension of time that appeared to acknowledge the fact that they had been served; and (2) upon receiving the Shipley Defendants' answer, Stewart had only one week in which to obtain extensions on their summonses. Therefore, the only issue before us in the present appeal is whether the Shipley Defendants are estopped from asserting that they were never properly served with process.

[1] Initially, the Shipley Defendants argue that Stewart failed to properly preserve this argument for appeal because she did not raise the estoppel issue in the trial court. The North Carolina Rules of Appellate Procedure provide that "[i]n order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context." N.C. R. App. P. 10(a)(1).

Stewart admits that she did not specifically reference the estoppel doctrine before the trial court. However, she asserts that because "contentions regarding the Shipley Defendants' knowledge of the lawsuit and subsequent filings regarding service" are "[r]life in the pleadings and hearing transcript surrounding the motion to dismiss," her intent to make an argument grounded in estoppel was apparent. She specifically cites to the portion of the hearing transcript in which her counsel stated the following:

> On March 7, the Shipley Defendants filed a Motion for Extension of Time to respond to the Plaintiff's Complaint, stating that the Complaint was . . . "allegedly served on or about February 19, 2016."
>
> To my way of thinking, the fact that they filed a Motion for Extension of Time to respond to the Complaint is pretty darn good evidence that they knew they had been sued. You don't file a motion for an extension of time if you don't know you've been sued.

Based on our careful review of the record, we are unable to agree that Stewart actually made an estoppel argument in the trial court. While Stewart's counsel relied upon the Shipley Defendants' filing of motions for extension of time in arguing that they knew of the lawsuit's existence, her attorney did not go on to further argue that the language contained in these motions led Stewart to rely to her detriment on the belief that the Shipley Defendants would not be contesting the adequacy of service. *See Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transp. Co.*, 362 N.C. 191, 195-96, 657 S.E.2d 361, 364 (2008) ("[A] party's failure to properly preserve an issue for appellate review ordinarily justifies the appellate court's refusal to consider the issue on appeal." (citations omitted)).

[2] However, even had Stewart properly preserved the issue for appeal, we conclude that her argument would still lack merit. In arguing that the Shipley Defendants are estopped, Stewart relies primarily upon our decision in *Storey v. Hailey*, 114 N.C. App. 173, 441 S.E.2d 602 (1994). In *Storey*, the plaintiff brought an action against the defendant seeking compensation for services rendered. The defendant was not a resident of North Carolina and had appointed Thomas Wellman, an attorney, as his process agent in North Carolina. A deputy sheriff attempted to effect service by leaving a copy of the summons and complaint with Wellman's law partner at his office. *Id.* at 175, 441 S.E.2d at 603-604.

Wellman subsequently entered an appearance as counsel for the defendant and filed a motion requesting an extension of time in which

to respond to Storey's complaint, which was granted. *Id.* Two additional extensions of time were obtained through stipulation of counsel, amounting to a total delay of "54 days past the date when [Storey] could have procured endorsement of the original summons or issuance of an alias and pluries summons[.]" *Id.* at 175, 177, 441 S.E.2d at 604, 605. At the end of this extended response period, the defendant obtained new counsel, who filed a motion to dismiss based, in part, on insufficiency of service of process, lack of personal jurisdiction, and the expiration of the statute of limitations. The trial court granted the motion. *Id.* at 175-76, 441 S.E.2d at 604.

On appeal, the plaintiff argued "that she was lured into a false sense of security in that defendant's initial trial counsel . . . manifestly [led] Plaintiff's trial counsel to believe that there would be no need to continue further process[.]" *Id.* at 176, 441 S.E.2d at 604. This Court agreed.

> [The] plaintiff was deprived of any opportunity to cure any defects in the process or in the service of process, because defendant's counsel led plaintiff's counsel to believe it was unnecessary to continue further process. Defendant, absent the additional extension of time stipulated to by plaintiff's counsel, would have been subject to entry of default following the expiration of the second extension . . . . The defendant's conduct in securing extensions of time, through opposing counsel's professional courtesy, to 54 days past the date when plaintiff could have procured endorsement of the original summons or issuance of an alias and pluries summons, acts to estop defendant from asserting these defenses.

Id. at 177, 441 S.E.2d at 605.

We distinguished *Storey* in *Washington v. Cline*, 233 N.C. App. 412, 761 S.E.2d 650 (2013). In *Washington*, the plaintiffs brought suit against twelve defendants. The plaintiffs failed to properly serve nine of the twelve defendants, although each defendant received actual notice of the suit. The nine defendants received extensions of time to file a responsive pleading from the trial court and subsequently filed motions to dismiss based on the defense of insufficiency of service of process, which the trial court granted. *Id.* at 413-15, 761 S.E.2d at 652-53.

The plaintiffs appealed the dismissal of the nine defendants to this Court, arguing, in part, that they were estopped from raising the issue of insufficiency of service of process based on *Storey*. We rejected this argument, stating as follows:

> Here, although defendants did receive extensions of time from the trial court, they explicitly stated that the reason for the extensions was to "determine whether any Rule 12 or other defenses [were] appropriate." Defendants-appellees' . . . motion to dismiss for insufficient service of process w[as] entered pursuant to Rule 12(b)(5). Therefore, plaintiffs had notice that such motions could be filed. Furthermore, defendants-appellees in fact served plaintiffs with their answer containing the defenses . . . four days before the last day in which plaintiffs could have obtained extensions of the summonses. It is evident that plaintiffs had actual notice of the defenses . . . . Therefore, because defendants were not responsible for plaintiffs' failure to extend the life of the summonses, we find that *Storey* is inapposite and defendants are not estopped from asserting the defense of insufficient service of process.

Id. at 418, 761 S.E.2d at 654-55.

In the present case, we are of the view that Stewart has failed to demonstrate the applicability of the estoppel doctrine. First, while the Shipley Defendants did move for extensions of time, their original motion stated that the purpose of the extension was "to respond to plaintiff's complaint, which was *allegedly served* on or about February 19, 2016." (Emphasis added.) Similarly, Instride's amended motion recited that Stewart's complaint "was *allegedly served* on or about March 10, 2016." (Emphasis added.) Thus, the Shipley Defendants' motions did not actually concede that the attempted service had been valid, and they served to put Stewart on notice of a possible defect with regard to service of process.

Second, in *Storey* the defendant asserted insufficiency of service as a defense almost two months after the expiration of the plaintiff's deadline for extending the summons. Here, conversely, Stewart concedes that there was a period of seven days between the date she received the Shipley Defendants' answer expressly asserting the defense and the last date on which she could have extended the summonses.[2]

Thus, we are unable to agree with Stewart that the estoppel doctrine applies under these circumstances. Accordingly, even had she

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2. We note that the record reveals service efforts on behalf of Stewart continued even beyond the date of the second motion for extension of time. According to the affidavit of a private process server retained by Stewart, copies of the summons and complaint were delivered to Dr. Shipley on 7 April 2016.

properly preserved this argument for appeal, we would nevertheless be compelled to affirm the trial court's dismissal of her claims against the Shipley Defendants.

Conclusion

For the reasons stated above, we affirm the trial court's 19 December 2016 order.

AFFIRMED.

Judges BRYANT and INMAN concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 5 MARCH 2019)

COLUMBUS CTY. D.S.S. EX REL. MOORE v. NORTON No. 18-642	Columbus (10CVD152)	Affirmed
DEP'T OF TRANSP. v. BLOOMSBURY ESTATES, LLC No. 18-773	Wake (15CVS9786)	Dismissed
EISENBROWN v. TOWN OF LAKE LURE No. 17-934	Rutherford (16CVS197)	Reversed in Part, Affirmed in Part
IN RE A.G.B. No. 18-729	Gaston (17JT249-250)	Affirmed
IN RE H.N.H. No. 18-365	Mecklenburg (15JT21-22)	Affirmed in part; remanded in part
IN RE I.L. No. 18-762	Onslow (14JT70)	Affirmed
IN RE S.H-K.J.L. No. 18-772	Columbus (15JT74) (15JT75)	Affirmed
IN RE S.S.S. No. 18-514	Buncombe (17JT134) (17JT136)	Dismissed
IN RE V.O. No. 18-907	Mecklenburg (18SPC1336)	Vacated and Remanded
PAINTER v. CITY OF MT. HOLLY No. 18-197	Gaston (15CVS3367)	Reversed
STATE v. ALTMAN No. 18-544	Chowan (14CRS50355)	No Error in Part. Vacated in Part.
STATE v. BENNETT No. 18-606	Iredell (15CRS54923-28)	No prejudicial error
STATE v. BERRIER No. 18-453	Randolph (16CRS704810-11)	New Trial
STATE v. COOPER No. 18-637	Beaufort (11CRS50617)	Vacated

STATE v. GASKINS No. 18-970	Pitt (15CRS55376)	Affirmed in Part, Reversed in Part, for Further Proceedings
STATE v. GILBERT No. 18-614	Brunswick (13CRS3448-49)	NO PLAIN ERROR IN PART, DISMISSED WITHOUT PREJUDICE IN PART.
STATE v. GILLIAM No. 18-260	Alexander (13CRS50356) (13CRS50462) (15CRS50577) (16CRS102) (17CRS191) (17CRS192)	Affirmed
STATE v. GUEVARA No. 18-582	Alamance (15CRS50308)	No Error; Remanded for resentencing.
STATE v. KESLER No. 18-971	Pitt (14CRS3508)	Affirmed in Part, Reversed in Part, Remanded for further Proceedings
STATE v. MAIER No. 18-771	Guilford (14CRS90531-32) (14CRS91658) (14CRS92810)	No Error
STATE v. OGLESBY No. 18-277	Mecklenburg (14CRS247193-96)	No Error
STATE v. RINEHART No. 18-298	Caldwell (16CRS638-639)	No Error
STATE v. ROBINSON No. 18-343	Mecklenburg (15CRS244267-71)	Reverse and Vacate in Part.
STATE v. SEEMAN No. 18-969	Pitt (15CRS55923)	Affirmed in Part, Reversed in Part, Remanded for further Proceedings
STATE v. WAYCASTER No. 18-247	McDowell (15CRS51973) (16CRS119)	No error in part; vacated and remanded in part.
STATE v. WYNN No. 18-536	Dare (16CRS267) (16CRS50291) (17CRS10)	No Error

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